Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

PAUL DURHAM MORGAN,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. The enactment of the REAL ID Act of 2005 mandated the transfer of all pending habeas cases to the circuit court of appeals. The REAL ID Act also required the court of appeals to treat these transferred cases as if it had been filed as a petition for review under 8 U.S.C. § 1252, *et al.* In its decision below, the Ninth Circuit noted that certain procedural difficulties existed with respect to cases which were transferred from the district courts to the court of appeals under the REAL ID Act of 2005.

These difficulties involved the necessity of conducting evidentiary hearings in cases where a petitioner has raised a viable legal or constitutional claim which could not have been asserted before an administrative agency. The Ninth Circuit acknowledged the existing paradox that appellate tribunals were unable to provide a petitioner with an evidentiary hearing in such circumstances. However, the Ninth Circuit-in the past-resolved this problem by transferring a case to the district court for fact finding under 28 U.S.C. § 2347(b)(3), when a petitioner has alleged a colorable legal or constitutional claim.

Here, the Ninth Circuit concluded that Petitioner failed to allege a colorable claim that the government violated his due process rights and therefore an evidentiary hearing on Petitioner's constitutional claim was unwarranted. In reaching this decision, the Ninth Circuit limited the scope of its examination to Petitioner's pleadings and the certified administrative record. It did not consider other evidence which was

extrinsic to the administrative but which was part of Petitioner's habeas proceeding.

1. The fundamental question, therefore, concerns the treatment of cases which have been transferred from the district courts to the courts of appeal under the REAL ID Act of 2005 and whether the circuit court may properly review evidence which is extrinsic to the certified administrative record to determine when a petitioner has alleged a colorable constitutional or legal claim warranting transfer of the proceeding to the district court for an evidentiary hearing in accord with 28 U.S.C. § 2347(b)(3).

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PETITION FOR WRIT OF CERTIORARI

Paul Durham Morgan, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Ninth Circuit entered in this case on July 26, 2007, (App. A hereto) and October 2, 2007, (App. B. hereto) respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals (App. E hereto) is unreported. The slip opinion of the Ninth Circuit Court of Appeals on the merits (App. A hereto) that is subject to review is reported at 495 F.3d 1084 (9th Cir. 2007). The order of the Ninth Circuit denying the petition for rehearing en banc in such case (App. B hereto) is unreported.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Ninth Circuit (App. A) was entered on July 26, 2007. A timely petition for rehearing en banc was denied on October 2, 2007. (App. C). The Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court thereby invoking the jurisdiction of the Supreme Court under Supreme Court Rule 10(c).

RELEVANT PROVISIONS INVOLVED

Immigration and Nationality Act § 242(a)(5), 8 U.S.C. § 1252(a)(5) provides in pertinent part:

> Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of the Act....

28 U.S.C. § 2347(b)(3) provides in relevant part that:

> When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall– ...(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue or material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

§106(c) of REAL ID Act, P. L. 109-13 (5/11/05) provides in relevant part:

> TRANSFER OF CASES- if an alien's case, brought under [28 U.S.C. § 2241], and challenging a

> final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under [§ 242(b)(2) of the Immigration and Nationality Act]...The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under section 242, except that subsection (b)(1) of such section shall not apply.

Immigration and Nationality Act § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) provides in relevant part:

"Aggravated Felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable."

Immigration and Nationality Act §101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) provides in relevant part:

> "The term 'aggravated felony' means-...(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);".

STATEMENT

I. Nature of the Case

This is a petition for review of the Ninth Circuit Court of Appeals decision affirming the Board of Immigration Appeals (the "Board") finding that the Petitioner is removable under 8 U.S.C. § 1227(a)(2)(A)(iii) and otherwise concluding that Petitioner failed to allege a colorable constitutional claim upon which relief might be granted.

II. Proceedings before the Immigration Court

The Petitioner is a native and citizen of England, whom the government admitted to the United States as a non-immigrant visitor for pleasure on November 8, 1981. The government authorized the Petitioner to remain in the United States until December 7, 1981. Petitioner, however, continued to stay in the United States beyond the time authorized under the terms of his visa.

In early 1982, agents from the Drug Enforcement Agency arrested the Petitioner. He was then indicted on several counts of Conspiracy to Illegally Import a Controlled Substance in violation of 21 U.S.C. §§ 952, 960 and 963. The government further indicted the Petitioner on multiple counts of Conspiracy to Possess a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1).

Prior to any final determination with respect to Petitioner's criminal matter, the then existing Immigration and Naturalization Service instituted

deportation proceedings against Petitioner. The government served and filed an Order to Show Cause against the Petitioner and it had initially alleged that Petitioner was a native and citizen of England who was subject to deportation from the United States since Petitioner remained in the United States beyond the period authorized under the terms of the Petitioner's visitor's visa.

At the time the government instituted deportation proceedings against Petitioner, the Petitioner was in the custody of the United States Marshall and he was awaiting trial with respect to his criminal case. During the pendency of Petitioner's deportation proceeding, a jury convicted the Petitioner in the United States District Court, Southern District of California, for the offense of Conspiracy to Possess a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). The Petitioner was further convicted of Conspiracy to Travel in Interstate and Foreign Commere in aid of Racketeering Enterprises in violation of 18 U.S.C. §§ 371 and 1952(a)(3)(A).

Petitioner received a five year sentence to imprisonment. This sentence was ultimately suspended subject to five years of probation. The Petitioner was then released into the custody of then Immigration and Naturalization Service. He was subsequently released on bond in January 1983.

From February 10, 1987 until December of 2000, the government took no action to remove Petitioner from the United States. In December of 2000, the Immigration and Naturalization Service served

Petitioner with notice that his deportation proceedings were being recommenced. In May 2001, the government issued additional charges of deportability against the Petitioner. Specifically, the government alleged that Petitioner's 1982 conviction constituted an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(B).

Through counsel, Petitioner attempted to obtain an "S" visa to remain in the United States. An "S" visa derives from 8 U.S.C. § 1101(a)(15)(S) and it provides the Attorney General with authority to grant non-immigrant status to a person "...in possession of critical reliable information concerning a criminal enterprise...[who] ...has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation...."

The Petitioner was unable to induce the agency to grant him an "S" visa. Petitioner's attorney argued before the Immigration Judge that Petitioner should receive a constructive "S" visa since Petitioner otherwise met all of the requirements for such classification. The Immigration Judge held that he lacked jurisdiction to grant this request. The Immigration judge did note, however, that this was a novel remedy. Nevertheless, in July 2003, the Immigration judge sustained the government's factual allegations and the charges of deportability, specifically that the Petitioner overstayed his visa and was subsequently convicted of both an aggravated felony and an offense relating to a controlled

substance. The Immigration Judge then ordered Petitioner deported to England. Petitioner timely appealed the decision of the Immigration Judge to the Board of Immigration Appeals.

III. Proceedings before the Board of Immigration Appeals

Before the Board, Petitioner argued that he was either (1) entitled to a constructive "S" visa, or (2) entitled to a remand to the Immigration Judge due to the ineffective assistance of his former criminal defense attorney by not filing for Judicial Recommendation Against Deportation (JRAD), which would have made Petitioner eligible for certain forms of relief from removal.

On October 12, 2004, the Board dismissed the appeal, holding that "jurisdiction to grant an S visa lies with the Department of Homeland Security... not with the Immigration Judge" and that Petitioner's ineffective assistance of counsel claim "would lie with the criminal courts, not with the Immigration Judge." (App. E) Moreover, the Board stated that "with respect to the [Petitioner's] constitutional arguments, we note that, as a general rule, this Board is without jurisdiction to entertain such arguments." (App. E) Petitioner then sought review before the United States District Court in habeas proceedings.

IV. Proceedings before the United States District Court

On April 13, 2005, Petitioner filed a petition for writ of habeas corpus in the United States District

Court for the District of Arizona. In his petition, the Petitioner contended that the government denied him due process of law since it failed to abide by its cooperation agreement with Petitioner that it would not remove the Petitioner from the United States in exchange for Petitioner's assistance with respect to the government's criminal prosecution.

In support of his habeas petition, Petitioner submitted his own detailed affidavit. (App. F hereto) Petitioner alleged that he had agreed to cooperate and assist the government through the Drug Enforcement Agency and the United States Attorney's office in Montana in regards to their prosecution of certain individuals who were involved in the drug conspiracy. (App. F) Petitioner further alleged that he was distinctly promised that he would be allowed to stay and work in the United States and not be deported from the United States in exchange for his testimony and assistance to the United States government. (App. F)

In its return, the government opposed the Petitioner's habeas petition and submitted affidavits from Mr. Byron "Pete" Dunbar, Robert Zimmerman- the chief criminal investigator in the Montana prosecution- and Don Richard Friend-a retired Drug Enforcement Administration special agent. (App. G, H, I and J hereto) Both Mr. Dubar and Mr. Zimmerman stated in their affidavits that it was their habit and practice to agree that an alien witness would not be deported for as long as their cooperation and testimony was required. With respect to Mr. Friend, he stated that he was directly involved in the investigation in which Petitioner cooperated and

assisted the government. He further stated that neither he nor any member of his staff entered into an agreement of immunity from deportation with the Petitioner in exchange for Petitioner's cooperation.

Prior to rendering a decision on the merits of Petitioner's habeas petition, Congress passed the REAL ID ACT of 2005. In accord with REAL ID ACT § 106(c), the District Court transferred the action as a petition for review to the Ninth Circuit Court of Appeals.

V. Statement of Facts

Subsequent to Petitioner's entry into the United States, agents from the Drug Enforcement Agency arrested the Petitioner in early 1982. He was then indicted on several counts of Conspiracy to Illegally Import a Controlled Substance in violation of 21 U.S.C. §§ 952, 960 and 963. The government further indicted the Petitioner on multiple counts of Conspiracy to Possess a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1).

As articulated above, a jury convicted the Petitioner in the United States District Court, Southern District of California, for the offense of Conspiracy to Possess a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). The Petitioner was further convicted of conspiracy to travel in interstate and foreign commere in aid of racketeering enterprises in violation of 18 U.S.C. §§ 371 and 1952(a)(3)(A).

Petitioner received a five year sentence to imprisonment. This sentence was ultimately suspended subject to five years probation. The Petitioner was then released into the custody of then Immigration and Naturalization Service. He was then released on bond in January of 1983.

Petitioner subsequently entered into a "cooperation agreement" with the government wherein Petitioner agreed to testify in support of the United States prosecution of a major drug case in the state of Montana. On April 12, 1983, Byron H. "Pete" Dunbar- the then United States Attorney for District of Montana- wrote a letter concerning Petitioner to United States Immigration Judge John Williams. (App. K hereto) Mr. Dunbar implored Judge Williams to transfer Petitioner's immigration proceeding to Helena, Montana, since Petitioner was an "...absolute necessary key witness[] in one of the most important narcotics cases to arise in the State of Montana..." (App. K) Based on this correspondence, the District Director for the then existing Immigration and Naturalization Service filed a written request for a change of venue for Petitioner's proceeding. On August 15, 1983, Immigration Judge Robert J. Barrett granted the government's change of venue request.

From February 10, 1987 until December of 2000, the government took no action to remove Petitioner from the United States. In December of 2000, the Immigration and Naturalization Service served Petitioner with notice that his deportation proceedings were being recommenced. In May 2001, the government issued additional charges of deportability against the Petitioner. Specifically, the government

alleged that Petitioner's 1982 conviction constituted an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(B).

Through counsel, Petitioner attempted to obtain an "S" visa to remain in the United States. An "S" visa derives from 8 U.S.C. § 1101(a)(15)(S) and it provides the Attorney General with authority to grant non-immigrant status to a person "...in possession of critical reliable information concerning a criminal enterprise...[who] ...has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation...."

Petitioner's counsel wrote several letters to several government employees involved in the Montana prosecution on which Petitioner cooperated. The letters requested assistance in obtaining an "S" visa for Petitioner. All of these efforts were unsuccessful. Since Petitioner was unable to induce the agency to grant an "S" visa to Petitioner, Petitioner's attorney argued before the Immigration Judge that Petitioner should receive a construct "S" visa since Petitioner otherwise met all of the requirements for such classification.

The Immigration Judge held that he lacked jurisdiction to grant this request. The Immigration judge did note, however, that this was a novel remedy. Nevertheless, in July 2003, the Immigration judge sustained the government's factual allegations and both of the charges of deportability, specifically that

Petitioner overstayed his visa and was subsequently convicted of both an aggravated felony and an offense relating to a controlled substance. The Immigration Judge then ordered Petitioner deported to England.

VI. Statement of the Court of Appeals and Supreme Court Jurisdiction

The Ninth Circuit Court of Appeals properly exercised jurisdiction under 8 U.S.C. § 1252 by reviewing a final agency determination to deport the Petitioner from the United States. Venue was also proper in the Ninth Circuit under the same statute since the agency completed deportation proceedings in Phoenix, Arizona.

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari is pursuant to United States Supreme Court Rule 10(c). Th petition for certiorari presents a substantial question because the Ninth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In its decision, the Ninth Circuit acknowledged certain procedural difficulties concerning jurisdictional transfer of habeas cases from the United States District Court to the Court of Appeals under § 106(c) of the REAL ID ACT. *Morgan v. Gonzales*, 495 F.3d 1084 (9th Cir. 2007) The Ninth Circuit noted that the procedural difficulties involved the adjudication of habeas petitions alleging colorable legal claims which could not be asserted before the administrative agency. *Id.* Further, while the Ninth Circuit acknowledged that petitioners who raise viable legal claims are

entitled to an evidentiary hearing, the court concluded that appellate tribunals are unable to provide one. *Id.* at 1090. (*citing Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 614, 620 (9th Cir. 2006)("[I]t is not the role of appellate courts to make findings of fact.")).

The Ninth Circuit noted that it had in the past "...resolved this problem by transferring [a] case to the district court for fact finding under 28 U.S.C. § 2347(b)(3), 'which authorizes such a transfer when an agency has not held a hearing before taking the complained-of action, and when a hearing is not required by law and a genuine issue of material fact is presented.'" *Id.* (*citing Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129 (9th Cir. 2001)). The Ninth Circuit reasoned that while this option remained open, it would not avail itself to this option "unless ...petitioner [] [] alleged a colorable claim upon which relief might be granted." *Id.*

The Ninth Circuit found support for this conclusion within the context of habeas corpus decisions. It noted that in habeas proceedings "...an evidentiary hearing is only required if (1) the petitioner's allegations, if proven, would constitute a colorable constitutional claim and (2) the state court trier of fact ha[d] not reliably found relevant facts after a full and fair hearing. *Id.* (*citing Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998))(text modified). With regard to the Petitioner's case, the Ninth Circuit noted that it was clear that Petitioner had yet to have "a full and fair hearing on the facts of his instant claims..." and therefore the question before the Ninth Circuit concerned "...whether the facts [Petitioner] ...alleged,

if proven, make out colorable claims ...for a due process violation...". *Id.* (text modified)

As articulated above, Petitioner contended that his due process rights were violated since the government failed to abide by its promise to provide Petitioner with relief from deportation in exchange for Petitioner's assistance and cooperation in a drug prosecution. While the Ninth Circuit acknowledged that "promises made by the government to induce either a plea bargain or a cooperation agreement must be fulfilled", the court noted that Petitioner failed to allege either in his brief or petition "...that an actual, explicit promise was made to him or, if one was, what the precise terms of that promise were...." *Id.* at 1091.[1] The Ninth Circuit concluded that under the circumstances Petitioner failed to state a colorable claim that the government violated his due process rights and therefore an evidentiary hearing on Petitioner's due process claim was unwarranted. *Id.*

In reaching this decision, the Ninth Circuit essentially limited its inquiry to Petitioner's pleadings and the certified administrative record. Nowhere in its decision did the Ninth Circuit discuss Petitioner's affidavit and evidence that was submitted as part of Petitioner's habeas corpus proceedings.

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[1] The Ninth Circuit referred to the term "petition" in its decision. However, it was not clear whether the Court was referring to the Petitioner's original habeas corpus petition before the United States District Court.

The fundamental question, therefore, concerns whether the Ninth Circuit should have considered Petitioner's affidavit and other evidence submitted in Petitioner's habeas proceedings, but which was not part of the certified administrative record, to determine whether Petitioner alleged a colorable constitutional claim warranting transfer of Petitioner's proceeding to the United States District Court for an evidentiary hearing in accord with 28 U.S.C. § 2347(b)(3).

Petitioner submits that the Ninth Circuits' decision was contrary to this Court's precedent and that of the federal courts as it concerns the scope of a federal court's authority to examine evidence, which is extrinsic to a certified administrative record, to ascertain whether a petitioner has alleged a colorable constitutional violation thereby warranting an evidentiary hearing. This Court's precedent and the precedent of the federal circuit court's of appeals have uniformly held that the federal courts have the authority to examine evidence outside of the administrative record in ascertaining the viability of a petitioner's legal or constitutional claim.

On rehearing, the Ninth Circuit completely sidestepped this issue and summarily denied Petitioner's appeal. The effect of the Ninth Circuit's decision is significant. It threatens thousands of aliens with removal without the ability to defend against it. Many aliens with viable legal and constitutional claims which cannot be asserted before the Board of Immigration Appeals will be left without an avenue in which to present This is especially important in matters involving the jurisdictional transfer of habeas

cases to the court of appeals under the REAL ID ACT. Under the Ninth Circuit's approach, aliens in Petitioner's position will be precluded from obtaining an evidentiary hearing in the event that they decided to forego the opportunity to develop a record before the administrative agency and otherwise vested their hopes in presenting evidence to support either their legal or constitutional claims in habeas proceedings in the district courts. A case of this importance deserves review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

In its analysis of the Petitioner's case, the Ninth Circuit overlooked material points of both law and fact. [1] In rejecting Petitioner's constitutional challenge, the Ninth Circuit failed to adhere to the principle that the federal courts in habeas proceedings have inherent power to "fashion appropriate modes of procedure..." including discovery in order to dispose of habeas petitions "as law and justice require." *Harris v. Nelson*, 394 U.S. 286, 295 (1969).

And while a court's review is generally limited to the administrative record in habeas proceedings, a "district court may, [in accordance with this legal principle], conduct a hearing to take evidence concerning illegal action that is not reflected in the record." *Johns v. Dep't of Justice*, 653 F.2d 884, 896 (5th Cir. 1981)(text modified); *Marczak v. Greene*, 971 F.2d 510, 518-19 (10th Cir. 1992)(administrative record consisted only of nine pages, including the letters requesting and denying parole. The district court could not re-evaluate the evidence presented and

decide whether the agency's decision was wise in absence of an evidentiary hearing.).[2]

While it is correct that Petitioner must have alleged that he received a specific promise from a government official in exchange for his cooperation and testimony, the Ninth Circuit's review whether Petitioner alleged such a claim was not limited either to the administrative record, or Petitioner's pleadings. *See Correll v. Stewart*, 137 F. 3d 1040, 1411 (9th Cir. 1998).

[2] Thus, case precedent should have compelled the Ninth Circuit to consider Petitioner's sworn declaration as part of its factual analysis. In his declaration, Petitioner alleged that he was "...distinctly promised that [he] would be allowed to stay and work in the US and not be deported to England...." Petitioner also stated that "...it was made clear to [him], that [he] would be allowed to stay in the US and not be deported in exchange for the testimony [he] provided and the assistance [he] provided to the

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[2] In this context, this Court and courts of appeal have developed a variety of fact finding approaches to ensure that a full record is developed and disputed issues resolved. *United States v. Hayman*, 342 U.S. 205, 223, (1952)("Where...there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."); *Cullen v. United States* ,194 F. 3d 401, 407 (2nd Cir. 1999)(remanding for *de novo* consideration of magistrate judge's findings in an ineffective assistance of counsel case, and requiring a testimonial hearing.); *United States v. Pisciotta*, 199 F. 2d 603 (2nd Cir. 1952)(court was dissatisfied with conclusory statements offered in an affidavit from a pro se petitioner and it remanded permitting petitioner to file a curative supplemental affidavit.).

government...." Petitioner further avowed that this was an agreement "...which [Petitioner] worked out with the [Drug Enforcement Agency]...." (App. D)

In light of this sworn statement, the Ninth Circuit overlooked material facts as it concerned Petitioner's allegation of a specific promise made to him from a government official. Given this specific allegation, the Ninth Circuit should have transferred this case to the district court for an evidentiary hearing.

1. *Case Precedent In Habeas Proceedings*

[3] Prior to the REAL ID Act of 2005[3], an alien who sought to raise a substantive due process challenge over which the agency lacked jurisdiction could file a habeas petition in a federal district court. *See Alfaro Reyes v. INS*, 224 F.3d 916, 921 (9th Cir. 2000)(acknowledging the "...availability of habeas review" for deportation cases involving "claims of ...constitutional violations.").

As articulated above, the Ninth Circuit noted that the jurisdictional transfer of these cases presented "procedural difficulties in adjudicating habeas petitions involving colorable legal claims that " could not be asserted before an agency. Yet, Ninth Circuit

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[3] Pub. L. No. 109-13, 119 Stat. 231, 310 (May 11, 2005). This legislation mandated the transfer of all habeas corpus petitions that were "pending in a district court on the date of [REAL ID's enactment]...to the court of appeal for the circuit in which a petition for review could have been properly filed..." § 106(c) of REAL ID Act.(text modified)

"resolved this problem by transferring the case to the district court for fact finding under 28 U.S.C. § 2347(b)(3)...". *Morgan v. Gonzales*, 495 F. 3d 1084, 1090 (9th Cir. 2007) . (*citing Gallo-Alvarez v. Ashcroft*, 266 F. 3d 1123, 1129 (9th Cir. 2001)).

Moreover, the Ninth Circuit looked to federal criminal habeas cases and noted that "an evidentiary hearing is only required [under 28 U.S.C. § 2347(b)(3)] if (1) the petitioner's allegations, if proven true, would constitute a colorable[4] constitutional claim and (2) the state court trier of fact has not reliably found the relevant facts after a full and fair hearing. *Id*. (*citing Correll v. Stewart*, 137 F.3d 1040, 1411 (9th Cir. 1998)).[5]

As the Ninth Circuit correctly noted, no trier of fact reliably found relevant facts since Petitioner had yet to have a full and fair hearing. The underlying inquiry, therefore, concerned whether Petitioner alleged an explicit promise that he would not be deported in exchange for his cooperation and assistance to the government.

As noted above, Petitioner's declaration reflects that Petitioner did receive an explicit promise from the

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[4] To be colorable in this context, the alleged violation need not be substantial. *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270 (9th Cir. 2001). However, the claim "must have some possible validity." *Id.*

[5] While Petitioner generally endorses the Ninth Circuit's analytical approach, Petitioner disagrees with the Court's self imposed limitation on its authority to review evidence which is extrinsic to the administrative record.

government in exchange for his cooperation and testimony. Petitioner avowed that this was an agreement "...which [Petitioner] worked out with the [Drug Enforcement Agency]...". (App. F)

[4] In *Machibroda v. United States*, 386 U.S. 487, 495 (1962), the defendant plead guilty in federal court to bank robbery charges and was sentenced to forty years in prison. *Id.* The defendant later filed a writ of habeas corpus in accordance with 28 U.S.C. § 2255 alleging that his guilty plea had been induced by an assistant United States attorney's promise that his sentence would not exceed twenty years. *Id.* The defendant further alleged that the prosecutor admonished the defendant not to tell his attorney about the agreement and that the trial judge failed to inquire whether the defendant's guilty plea was made voluntarily. *Id.*

This Court concluded that the allegations, if proved, would have entitled the defendant to relief since it raised an issue of fact that could not be resolved simply on the basis of an affidavit from the prosecutor denying the defendant's allegations. *Id.* Since defendant's allegations "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light" and were not so "vague [or] conclusory" to permit summary disposition, the Court ruled that the defendant was entitled to the opportunity to substantiate his claims at an evidentiary hearing. *Id.*

By analogy, the allegations in Petitioner's declaration were not in themselves vague or conclusory as to warrant dismissal. Rather, Petitioner alleged

that he was specifically promised that he would not be deported in exchange for his cooperation in a federal drug prosecution. Petitioner avowed that this was an agreement "...which [Petitioner] worked out with the [Drug Enforcement Agency]...." (App. F) Furthermore, the Petitioner also alleged that about three days after Petitioner was arrested in Phoenix, "the [Drug Enforcement Agency initially] offered [Petitioner] a deal... if [Petitioner] testified against the other defendants...[the government][6] would let [Petitioner] out and allow Petitioner to return home to England..." (App. F) Petitioner, stated, however, that he "did not accept the deal since returning to England was not an option for [Petitioner's] wife, Cheryl, and [Petitioner]. *Id.* Petitioner stated that if he accepted the government's offer his life "would be at risk." *Id.*

Even if Mr. Dunbar's affidavit and the affidavits of the government's witnesses do not support Petitioner's assertions in his declaration, Petitioner's declaration still creates an issue of fact requiring an evidentiary hearing because his allegations raise factual issues for which the review of the administrative record in this case cannot resolve. Furthermore, the allegations were not so "palpably incredible" as to warrant dismissal. *Machibroda v. United States*, 386 U.S. 487, 495 (1962).

Given Petitioner's fear that he and his spouse would have been harmed if they returned to England after Petitioner testified against his fellow defendants,

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[6] Petitioner used the term "they." Presumably, Petitioner was referring to the government and/or the Drug Enforcement Agency.

it was indeed plausible that Petitioner would not have agreed to cooperate with the government in absence of either a promise or assurance of immunity from deportation.

The Ninth Circuit, therefore, erred when it summarily dismissed Petitioner's petition for review and it should have transferred the matter for an evidentiary hearing before the district court since Petitioner is "entitled to careful consideration and plenary processing of [his claim], including full opportunity for the presentation of ...relevant facts." *Harris v. Nelson*, 394 U.S. 286 (1969) (text modified).

2. *Authority To Transfer Cases Under 28 U.S.C. § 2347(b)(3)*

28 U.S.C. § 2347(b)(3) provides in relevant part that:

> When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall– ...(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue or material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

[5] The terms of this statute provide the courts of appeals with the authority to transfer cases t to the district court when a petitioner presents a material issue of fact which requires resolution. The evidentiary standard to determine when the transfer of a case is appropriate to a district court, which is contained in 28 U.S.C. § 2347(b)(3), is virtually identical to the language in FEDERAL RULE OF CIVIL PROCEDURE 56, which governs motions for summary judgment.

In *Agosto v. INS,* 436 U.S. 748 (1978) , this Court reviewed an alien's nationality claim under 8 U.S.C. § 1105a(a) (1976) (repealed 1996) which-like the current § 242(b)(5) [8 U.S.C. § 1252(b)(5)]- required the court of appeals to determined from the pleadings and affidavits filed by the parties whether a "genuine issue of material fact about the petitioner's nationality claim is presented." *Id.* This Court reasoned that in "using the language from rule 56 as the standard for granting *de novo* district court hearings on citizenship claims, Congress intended the language to be interpreted similarly to that in rule 56." *Id.* at 754.

The same reasoning holds true with respect to 28 U.S.C. § 2347(b)(3) since this provision utilizes the same evidentiary standard to determine when transfer of a case is warranted to the district court. Indeed, it is reasonable to assume that Congress intended 28 U.S.C. § 2347(b)(3) to be interpreted similarly to rule 56 and otherwise embrace a familiar feature of summary judgment practice.

In summary judgment proceedings, parties can submit affidavits that are not based on an existing

record for the purpose of demonstrating that a genuine issue of material fact exists requiring resolution by a fact finder. *See Bautista v. Ashcroft*, 270 F.3d 8, 13 (1st Cir. 2001). In reviewing pleadings and affidavits for material facts in dispute sufficient to warrant an evidentiary hearing, a court of appeals is placed in the same position as that of a trial court presented with a motion for summary judgment. *Id.* In *Agosto*, this Court emphasized that " a court of appeals cannot refuse to allow a *de novo review* of a citizenship claim if the evidence presented in support of that claim would be sufficient to entitle a litigant to trial...". *Id.* at 756.

Given the statutory language of § 2347(b)(3), it was appropriate for the Ninth Circuit to look for a genuine issue of material fact in the pleadings and the affidavits of both Petitioner and the government's witnesses and "...without regard to whether such materials [were] part of the administrative record" in deciding whether Petitioner alleged a colorable due process claim thereby warranting the transfer of Petitioner's proceeding to the district court. *Bautista v. Ashcroft*, 270 F.3d 8, 13 (1st Cir. 2001) (text modified); *see also Pignatello v. Attorney General of the United States*, 350 F.2d 719, 723 (2nd Cir. 1965) (Second Circuit transferred proceedings to the district court after considering and concluding that evidence outside of the administrative record presented a genuine issue of material fact with respect to petitioner's nationality claim.); *accord Ngyuen v. INS*, 208 F.3d 528, 532 (5th Cir. 2000), *aff'd* 533 U.S. 53, 150 L. Ed. 2d 115, 121 S. Ct. 2053 (2001).

CONCLUSION

Petitioner respectfully submits that the Ninth Circuit erred in the following respects:

The Ninth Circuit Court of Appeals failed to acknowledge that the scope of its authority to review pleadings and evidence of record was not limited to the certified administrative record on appeal in deciding whether Petitioner's alleged a due process claim warranting the transfer of Petitioner's proceedings to the district court for an evidentiary hearing. Given this error, the Ninth Circuit limited its inquiry to the certified administrative record and Petitioner's pleadings and it erroneously concluded that Petitioner did not allege a colorable constitutional claim and therefore Petitioner was not entitled to an evidentiary hearing.

Thus, Petitioner respectfully prays that this Court grant this petition for writ of certiorari, reverse the decisions of the Ninth Circuit Court of Appeals and the Board, and otherwise remand the matter to the Ninth Circuit for consideration whether- in light of Petitioner's affidavit and other evidentiary materials extrinsic to the administrative record-an evidentiary hearing is warranted on Petitioner's constitutional claim.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-74378
Agency No. A24-299-945

[Filed July 26, 2007]

Paul Durham Morgan, Petitioner,	)
vs.	)
Alberto R. Gonzales, Attorney General, Respondent.	)

On Petition for Review of an Order of the Board of Immigration Appeals

Before: Michael Daly Hawkins, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether the United States is estopped from removing an aggravated felon because the government allegedly

agreed not to deport him in exchange for his cooperation in a federal drug prosecution. Under the circumstances presented by this case, we deny the petition for a writ for review.

I

Paul Durham-Morgan is a native and citizen of England who entered this country as a non-immigrant visitor on November 8, 1981. He was authorized to remain until December 7, 1981, but exceeded his authorization. In early 1982, Morgan was arrested and charged with various drug trafficking offenses. He was then served with an Order to Show Cause charging him as being subject to deportation for overstaying his visa. In October 1982, Morgan was convicted of conspiracy to illegally import a controlled substance in violation of 21 U.S.C. §§ 952, 960 and 963; conspiracy to possess a controlled substance with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1); conspiracy to travel in interstate and foreign commerce in aid of racketeering enterprises in violation of 18 U.S.C. §§ 371 and 1952(a)(3)(A); and travel in interstate commerce in aid of racketeering enterprises in violation of 18 U.S.C. § 1952(a)(3)(A). He was sentenced to five years imprisonment, but the sentence was suspended subject to five years of probation. He was released into the custody of the then-Immigration and Naturalization Service ("INS") and was subsequently released under a bond in January 1983.

Morgan asserts that he then entered into a cooperation agreement with the government wherein he agreed to testify in support of the U.S. Attorney's

prosecution of a major drug case in Montana in exchange for certain promises regarding his immigration status. In March 1983, then-U.S. Attorney for the District of Montana Pete Dunbar[1] authorized a written request to the Helena, Montana, office of the INS to transfer Morgan's case from the San Diego Office of the INS and to grant Morgan employment authorization so he could support himself and his wife while helping the U.S. Attorney with his investigation and prosecution. Dunbar authorized a similar letter to the San Diego office of the INS in April 1983.

Dunbar substantiated in an affidavit that Morgan was cooperating with authorities, as he alleged. However, Dunbar did not indicate in the affidavit that there was an explicit quid pro quo agreement wherein he agreed to testify in exchange for a grant of permanent residence in the United States. Dunbar described Morgan and his wife as "absolute[ly] necessary key witnesses in one of the most important narcotics cases to arise in the State of Montana." Dunbar also stated in his letter to the INS District Director in Montana that "[i]t is necessary that [Morgan's wife's] visitor permit be extended" and that "[w]e do not have an indictment let alone a trial date in this case so it is difficult to predict how long it will

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[1] We note with regret the death of former U.S. Attorney Byron H. "Pete" Dunbar on June 5, 2007. His lifetime of public service culminated in his appointment as U. S. Attorney for the District of Montana in 1981 by President Ronald Reagan. He served with great distinction in that position until 1990.

be necessary to continue this proposed arrangement." Morgan's case was transferred to Montana, and the government concedes that Morgan was subsequently issued a Form I-94 with employment authorization. However, neither Dunbar nor Morgan affirm that there was an explicit promise to Morgan of permanent residence in exchange for his testimony.

Morgan asserts that the government contacted him again in February 1987 to ascertain his status. In this letter, the government acknowledged that Morgan had been granted permission to remain in the United States on a "temporary basis." The parties do not dispute that no action was taken by the government between February 1987 and December 2000. In December 2000, the INS served Morgan with notice that his removal proceedings were being recommenced. In May 2001, the government issued a form I-261 against Morgan, alleging that his 1982 conviction constituted additional grounds for deportation.

Through counsel, Morgan then sought to obtain an S visa to remain in the United States. The so-called "S visa" derives from 8 U.S.C. § 1101(a)(15)(S), which gives the Attorney General authority to grant a nonimmigrant visa to a person "in possession of critical reliable information concerning a criminal organization or enterprise . . . [who] . . . has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation . . . ." The Attorney General may adjust the status of an S visa holder to permanent resident if, in his opinion, the information provided by

the alien "has substantially contributed to the success" of an investigation or prosecution. 8 U.S.C. § 1255(j). A request for an S visa "may only be filed by a federal or state [law enforcement agency]" through the filing of a Form I-854, which is then submitted for discretionary approval by the proper government officers as detailed in 8 C.F.R. § 214.2(t)(4).

Morgan's lawyer wrote to several government employees involved in the Montana prosecution on which Morgan cooperated, asking for assistance in obtaining an S visa for Morgan. These efforts were unsuccessful. Though Dunbar provided Morgan with an affidavit attesting to Morgan's assistance in the prosecution, Morgan claims the remainder of the agencies he contacted were unable to help either because they did not possess records going back that far or because the officials involved in Morgan's case were no longer working for the government.

Unable to induce an agency into granting an actual S visa, Morgan then asked the immigration judge ("IJ") to grant him a "constructive S visa" because, he claimed, he met all the requirements. The IJ stated that he lacked jurisdiction to issue a "constructive S visa" — only an authorized Law Enforcement Agency could do that. The IJ, acknowledging that this was a novel remedy although not entirely unsympathetic to it, asked if Morgan was going to pursue it further in district court. Morgan's counsel answered, "Right. I'm going to exhaust all administrative remedies." Morgan's counsel explained at that time that "[t]his is a case where we're going to be continuing with appeals raising due process and constitutional claims. We're going to be following *Matter of Thomas* as well as a

written coram nobis in district court." In July 2003, the IJ sustained the factual allegations and charges that Morgan had overstayed his visa, was guilty of an aggravated felony and was convicted of a controlled substances offense. The IJ then ordered Morgan deported to England.

Morgan appealed the IJ's decision to the BIA. Before the BIA, he argued that he was either (1) entitled to a constructive S visa, or (2) entitled to remand to the IJ "due to the ineffective assistance of his former criminal defense attorney by not filing for a Judicial Recommendation Against Deportation (JRAD), which would have made [Morgan] eligible for certain forms of relief from removal." The BIA dismissed his appeal, holding that "jurisdiction to grant an S visa lies with the Department of Homeland Security . . . not with the Immigration Judge" and that Morgan's ineffective assistance of counsel claim "would lie with the criminal courts, not with the Immigration Judge." Finally, the BIA stated "with respect to the respondent's constitutional arguments, we note that, as a general rule, this Board is without jurisdiction to entertain such arguments."

In April 2005, Morgan filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. Upon motion of the government and pursuant to the REAL ID Act § 106(c), the district court transferred the action as a petition for review to this Court.

II

[1] The government argues that we lack jurisdiction over Morgan's due process and equitable estoppel claims because he did not raise them before the agency and they are therefore unexhausted. Morgan does not claim to have raised these challenges before the IJ or BIA, and for good reason. The agency has no power to grant relief on estoppel or substantive due process claims, and accordingly, we have never required petitioners to exhaust claims of this nature before the agency. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 977 (9th Cir. 2006); *Wang v. Reno*, 81 F.3d 808, 814 (9th Cir. 1996).[2] Morgan thus did not fail to raise his due process and equitable estoppel claims before the BIA and is not barred from raising them here for the first time, and we have jurisdiction to consider them.

III

[2] Prior to the Real ID Act, when a petitioner sought to raise substantive due process challenges like Morgan's or other challenges over which the agency lacked jurisdiction or the power to grant relief, the petitioner would file a habeas petition in federal district court. *See, e.g.*, *Alfaro-Reyes v. INS*, 224 F.3d

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[2] The exception to the rule that constitutional claims need not be exhausted before the agency are claims of denial of procedural due process by the IJ, which must be raised before the BIA because the agency does have the power to adjudicate procedural due process claims. *See, e.g.*, *Sun v. Ashcroft*, 370 F.3d 932, 944 n.18 (9th Cir. 2004).

916, 921 (9th Cir. 2000) (noting "the availability of habeas review" for deportation cases involving "claims of . . . constitutional violations"). If any factual matters needed to be resolved, the district court would hold the necessary hearings, admit any relevant evidence, and resolve them. Pursuant to the Real ID Act, however, jurisdiction over habeas petitions challenging final orders of removal is vested "sole[ly]" in the Courts of Appeal; district courts no longer have habeas jurisdiction over such petitions. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2005).

This jurisdictional transfer presents procedural difficulties in adjudicating habeas petitions involving colorable legal claims that cannot be asserted before the agency. Petitioners raising viable legal claims are entitled to an evidentiary hearing, *see Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000), but the Courts of Appeal are unable to provide one, *see Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1237 (11th Cir. 2006) ("[I]t is not the role of appellate courts to make findings of fact.") (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986)).

On occasion, we have resolved this problem by transferring the case to the district court for fact-finding under 28 U.S.C. § 2347(b)(3), "which authorizes such a transfer when an agency has not held a hearing before taking the complained of action, and 'when a hearing is not required by law and a genuine issue of material fact is presented.' " *See Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123, 1129 (9th Cir. 2001) (quoting 28 U.S.C. § 2347(b)(3)) (citing *Reno*

v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 496-97 & n.2 (1999) (Ginsburg, J., concurring)).

[3] While this option remains open to us, we need not avail of it unless the petitioner has alleged a colorable claim upon which relief might be granted. In the habeas context, an evidentiary hearing is only required if (1) the petitioner's allegations, if proven, would constitute a colorable constitutional claim, and (2) the state court trier of fact has not reliably found the relevant facts after a full and fair hearing. *See Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). Because it is clear that Morgan has not yet had a full and fair hearing on the facts of his instant claims, the question before us is whether the facts he has alleged, if proven, make out colorable claims for either a due process violation based on estoppel principles or a substantive due process violation under the state-created danger doctrine.

A

[4] Morgan contends that his due process rights were violated because the government promised him relief from deportation if he would cooperate in a drug prosecution. As a general matter of fundamental fairness, promises made by the government to induce either a plea bargain or a cooperation agreement must be fulfilled. *See Johnson v. Lumpkin*, 769 F.2d 630, 633 (9th Cir. 1985) (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). The agreement, however, must be made by a government official authorized to make it and the promisee must rely on it to his detriment. *Thomas v. INS*, 35 F.3d 1332, 1337 (9th Cir. 1994). A United States Attorney is authorized to

enter into cooperation agreements and, in so doing, to make promises that are binding on other Federal agencies. *Id.* at 1340 (U.S. Attorney could bind INS).

[5] However, in this case, Morgan has not alleged that an actual, explicit promise was made to him or, if one was, what the precise terms of that promise were. Although he argues correctly that a United States Attorney has the power to make promises to an alien that are binding on the government, nowhere in his brief or petition does he state that either the U.S Attorney or anyone else actually made an explicit promise that he would be granted permanent residence in exchange for his cooperation. All he alleges is that he "agreed to testify in support of the United States prosecution of a major drug case in the State of Montana" and that U.S. Attorney Dunbar arranged for the transfer of Morgan's immigration proceedings from California to Montana, and arranged for Morgan and his wife to receive employment authorization. Morgan further clarifies that "[t]he government did not specify a fixed period when [his] employment authorization would expire," and "grant[ed him] permission to remain in the United States *on a temporary basis*." (emphasis added). Morgan then states that based on these actions, "it was not unreasonable for [him] to believe that his cooperation with the government meant that he would be allowed to remain in the United States."

[6] Because Morgan has not alleged that an actual promise was made, he has not stated a colorable claim that his due process rights were violated under the *Santobello* doctrine. Even if everything he alleges is found to be true at an evidentiary hearing, it would not

prove that the government's attempt to remove him is in breach of an explicit term of his cooperation agreement. That Morgan believed he would be allowed to remain in the United States indefinitely is not the same as being explicitly promised as much by an authorized agent of the U.S. government. Nor is there any external evidence of a promise. Dunbar's affidavit says nothing about having made any explicit promise granting Morgan permanent residency in the United States in exchange for his cooperation.

[7] Under the circumstances, an evidentiary hearing on Morgan's *Santobello* due process claim is unwarranted. Evidentiary hearings in this context, as in habeas, are not meant to be "fishing expeditions for . . . petitioners to explore their case in search of its existence." *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (internal quotations omitted). Nor are petitioners such as Morgan automatically entitled to discovery absent evidence that their claims are colorable. *Id.* at 1068. Because Morgan has not alleged that an explicit promise was made and because the only evidence he has tendered suggests that no such promise was made, we decline to exercise our transfer power to grant an evidentiary hearing on the basis of this theory of relief.

B

Morgan argues in the alternative that even if no express promise of permanent residence was made, the government's actions — specifically, its delay in seeking to remove him — reasonably led him to believe that he would be permitted to remain in the United

States indefinitely and thus the government should be equitably estopped from attempting to remove him.

[8] "A party seeking to raise estoppel against the government must establish affirmative misconduct going beyond mere negligence; even then, estoppel will only apply where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (en banc) (internal quotations and alteration in original omitted). "[E]stoppel against the government is unavailable where petitioners have not lost any rights to which they were entitled." *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000). When estoppel is available, the court then considers its traditional elements, which include that "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Watkins*, 875 F.2d at 709.

[9] Here, Morgan's only claim of affirmative misconduct is the extreme delay of the INS in seeking to remove him. In *Jaa v. INS*, 779 F.2d 569 (9th Cir. 1986), we considered whether delay by the INS of 58 months was enough to constitute affirmative misconduct. We held that there was no evidence that the government's delay was on account of anything other than neglect and that "[n]eglect will not support estoppel." *Id.* at 572. Likewise, there is no apparent reason for the government's delay here except neglect. If anything, the government did not follow up on

Morgan's case sooner because immigration authorities were told that his cooperation with the U.S. Attorney in Montana could last for an indefinite period of time.[3]

The case Morgan cites, *Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976), holds only that INS delay can amount to affirmative misconduct when the INS had a clear duty to act and its not acting deprived the alien of a right to relief. *Id.* at 1328-29. Here, the INS was under no clear duty to deport Morgan, nor did he have a right to relief.

[10] Morgan's allegations do not amount to a constitutional violation even if true. Accordingly, there is no genuine issue of material fact warranting a transfer and hearing.

C

Morgan also contends that removal to England would violate his substantive due process rights under the state-created danger doctrine.

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[3] We need not decide today whether under extreme circumstances, negligent delay could constitute grounds for estoppel. We hold only that on these facts, where Morgan entered the United States as an adult, engaged in drug trafficking, cooperated with the government and was then not pursued for removal for at least thirteen years because immigration authorities were either neglectful or still under the impression that his cooperation with drug prosecutions was ongoing, the equities do not support Morgan's estoppel claim.

[11] As a general rule, the government is not liable for the actions of third parties. *See Deshaney v. Winnebago County*, 489 U.S. 189, 195-96 (1989). This rule is modified by two exceptions: "(1) the 'special relationship' exception; and (2) the 'danger creation' exception." *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The special relationship exception comes, as its name suggests, from when the government enters into a special relationship with a party, such as taking the party into custody or placing him into involuntary hospitalization. *Id.* The danger creation exception arises when "affirmative conduct on the part of the state" places a party in danger he otherwise would not have been in. *Id.*

We have repeatedly held that government agents may be liable for affirmative conduct placing a party in a danger of the government's creation even though the general rule is that the Fourteenth Amendment does not impose a duty on government officers to protect individuals from third parties. *See, e.g., Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (permitting § 1983 suit against police officers who forced drunk bar patron outside in only jeans and a tee-shirt in subzero conditions leading to his death from hypothermia); *Grubbs*, 974 F.2d at 127 (permitting § 1983 suit against state employees who placed a female employee into a situation with a known violent sex offender who raped her); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (permitting § 1983 suit against police officers who stranded woman in high-crime area in which she was subsequently raped).

[12] The state-created danger doctrine may also be invoked to enjoin deportation. *See Wang*, 81 F.3d at

818-19. In *Wang*, U.S. officials arranged to bring a Chinese citizen to the United States to testify in a heroin case. *Id.* at 811-12. Wang had previously been tortured by Chinese officials in order to get him to falsely implicate another suspect for which they generously promised Wang leniency on charges stemming from his own involvement in the drug transaction. *Id.* at 811. When Wang came here, however, after U.S. officials had misled both him and the Chinese, he was forced into the Hobson's choice of testifying truthfully under oath here and losing his Chinese leniency and risking further torture upon his return, or perjuring himself here. *Id.* at 813. After U.S. officials created this situation and forced Wang into this choice, they then sought to return him to China where there was a high likelihood he would be tortured for his truthful testimony here. *Id.* at 819. The district court found that the government's behavior shocked the conscience and also that the government had created the dangerous predicament Wang was in. *Id.* at 819. It permanently enjoined the Attorney General from returning Wang to China. *Id.* at 812-13. In affirming, we found that the government had entered into a special relationship with Wang by taking him into custody and then engaged in "gross negligence and deliberate indifference" in creating the danger that Wang would "likely be tortured" if returned to China. *Id.* at 818-20. We held that the district court properly exercised its supervisory power to remedy the "extraordinary nature of the government's misconduct," by enjoining the government from returning Wang to China. *Id.* at 820.

[13] Here, however, Morgan does not allege anything approaching the kind of affirmative

government misconduct found in *Wang*. He argues that were he returned to England, former associates from his drug-running days twenty-five years past would be likely to take their revenge on him for his cooperation with U.S. authorities. Even on the facts as he asserts them, there is no suggestion that the government, in entering into a cooperation agreement with him and then seeking to remove him to England, has acted with "gross negligence and deliberate indifference." Unlike in *Wang*, there is no suggestion that the English government would be unwilling and unable to protect him. Nor has Morgan alleged that U.S. officials engaged in serious misconduct by either deceiving him or coercing his testimony.

Although Morgan seeks an evidentiary hearing to develop the factual basis for his claim, the arguments he has put forth are insufficient to warrant him protection under the state-created danger doctrine even were he to prove everything he has alleged. Accordingly, there is no genuine issue of material fact and we opt not to transfer this case to the district court for further fact finding.

IV

[14] In sum, because Morgan has not alleged a colorable claim for equitable estoppel or violation of his substantive constitutional rights, his case does not warrant transfer to the district court for further fact finding under 28 U.S.C. § 2347(b)(3). We deny the petition for review.

PETITION DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 05-1112-PHX-JAT

[July 14, 2005]

Paul Durham Morgan,	)
Petitioner,	)
	)
vs.	)
	)
Alberto R. Gonzales, et al.,	)
Respondents.	)
	)

TRANSFER ORDER

On April 13, 2005, Petitioner Paul Durham Morgan (A24-299-945), who is represented by counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. Petitioner also filed an Emergency Motion for Temporary Restraining Order (Doc. #4) seeking a stay of removal pending a decision on the merits of his Petition. On the same day, the Court issued an Order (Doc. #5) declining to grant an *ex parte* temporary restraining order, but treating Petitioner's emergency motion as a request for a preliminary stay of removal and setting the matter for oral argument. The parties subsequently filed a

Stipulation (Doc. #7) agreeing to reset the hearing. The parties also stipulated that Petitioner would report to Immigration and Customs Enforcement on April 20, 2005, but that he would not be deported and would not be taken into custody while his request for a preliminary stay of removal was pending. On May 10, 2005, the Court heard oral argument on Petitioner's request for a preliminary stay of removal and took the matter under advisement.

On May 13, 2005, Respondents filed a Supplement and Motion to Transfer (Doc. #16). Respondents argue that the Court's jurisdiction over this matter has been eliminated by the enactment of the REAL ID Act of 2005, Pub. L. No. 109-13,119 Stat. 231 (May 11, 2005). Respondents request that this action be transferred to the United States Court of Appeals for the Ninth Circuit pursuant to REAL ID Act § 105(c). Petitioner has not responded to the Motion to Transfer.

As amended by the REAL ID Act, 8 U.S.C. § 1252(a)(5) now provides in relevant part:

> (5) EXCLUSIVE MEANS OF REVIEW.– Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e).

REAL ID Act § 106(a)(1)(B). By this amendment, Congress has deprived this Court of habeas corpus jurisdiction to review an order of removal entered under the Immigration and Nationality Act. Moreover, REAL ID Act § 106(b) that § 106(a) of the Act is retroactive: "subsection (a) shall take effect upon the date of enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of enactment." REAL ID Act § 106(b). Because the underlying Petition for Writ of Habeas Corpus challenges "the lawfulness of the Board of Immigration Appeals' [removal] order entered against the Petitioner on October 12, 2004," (Petition at 1), this Court no longer has jurisdiction over this action. However, the lack of jurisdiction in this Court, does not necessarily mean that Petitioner is without a remedy.

In addition to stripping the district courts of jurisdiction to review orders of removal, the REAL ID Act also "restored judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders" in the courts of appeals. *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005). Under the prior version of 8 U.S.C. § 1252(a)(2)(C), the courts of appeals were deprived of jurisdiction to review removal orders entered against certain criminal aliens. But REAL ID Act § 106(a)(1)(A)(iii) restored jurisdiction in the courts of appeals to review removal orders entered against criminal aliens:

> (D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAMS.--Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

REAL ID Act §106(a)(l)(A)(iii); *Fernandez-Ruiz*, 410 F.3d at 587. Additionally, REAL ID Act § 106(c) provides that if any § 2241 habeas corpus case "challenging a final administrative order of removal . . . is pending in a district court on the date of enactment, then the district court shall transfer the case. . . to the [appropriate] court of appeals." REAL ID Act §106(c). Accordingly, Respondents' Motion to Transfer will be granted and this action will be transferred to the United States Court of Appeals for the Ninth Circuit. Because Petitioner's request for a stay of removal is still pending, the transfer of this action to the Ninth Circuit triggers a temporary stay of removal under Ninth Circuit General Order 6.4(c)(1). *See Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 854 (9th Cir. 2004) (filing of a petition for review and request for stay of removal caused a temporary stay to automatically issue).

IT IS THEREFORE ORDERED that Respondents' Motion to Transfer (Doc. #16) is **granted** and the Petition and this action shall be **transferred as a petition for review** to the United States Court of Appeals for the Ninth Circuit pursuant to section

106(c) of the REAL ID Act of 2005. The Clerk of Court shall transfer this action forthwith.

DATED this 14th day of July, 2005.

/s/
James A. Teilborg
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 05-74378
Agency No. A24-299-945

[Filed October 2, 2007]

PAUL DURHAM MORGAN,
Petitioner,

vs.

ALBERTO GONZALES, Attorney General,
Respondent.

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 05-1112-PHX-JAT

[May 10, 2005]

Paul Durham Morgan,	)
Petitioner,	)
	)
vs.	)
Alberto Gonzales, et al.,	)
Respondents.	)
	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Motion Hearing re: TRO)

BEFORE: THE HONORABLE **JAMES A. TEILBORG**, JUDGE

Phoenix, Arizona
May 10, 2005

(Proceedings convened at 8:35 a.m.)

THE COURT: Thank you. Please be seated.

I'll ask the clerk to call the next matter, please.

THE CLERK: Civil case 05-1112, Morgan versus Gonzales. This is the time set for a motion hearing regarding TRO.

Please announce your presence for the record.

MS. PARSONS: Cynthia Parsons for the respondents, Your Honor. Good morning.

THE COURT: Good morning, Miss Parsons.

MR. SURIEL: Good morning, Your Honor. Nick Suriel for the petitioner, Mr. Morgan.

THE COURT: Good morning.

And it is -- you pronounce it Suriel, is that right?

MR. SURIEL: Suriel.

THE COURT: Suriel.

MR. SURIEL: Yes, sir.

THE COURT: I'll probably still butcher but I at least want to try to get it right.

Good morning.

MR. SURIEL: Good morning.

MS. PARSONS: Good morning.

THE COURT: This is the time set for the preliminary injunction hearing, and I have read the

papers, including the government's response, which I received at the end of the day yesterday.

So, Mr. Suriel, you may proceed.

I suppose my opening question would be, on the asylum argument, I guess there's what I would just call a hint of persecution that your client might have faced upon return to England, but, in my judgment, it's just a hint, and wouldn't he have had to be -- don't you have to show today that he would have been in a class then that would have at least given him a colorable claim to asylum had he pursued it?

MR. SURIEL: Right. Your question is very germane, and actually, he has a significant right that was given up.

If I may, Your Honor, I believe that the temporary restraining order is necessary and warranted in this case for several statutory reasons, and I will briefly outline those.

Since you've asked me the question regarding political asylum, let me address that right off the bat.

By virtue of his testimony, by virtue of his cooperation with the government's case, Mr. Morgan and his then wife became subject to significant harm upon return to Britain because he was basically testifying against people that were involved in this conspiracy that he helped the government prosecute, and so therefore, returning to England, his claim would be subject to persecution on the part of people that the government would have no ability to control.

THE COURT: Reduced to its most basic, you're talking about the dangers facing a snitch.

MR. SURIEL: Yes, Your Honor.

THE COURT: Is there a case anywhere that a snitch, by virtue of creating his or her own class, can become entitled to asylum?

MR. SURIEL: Absolutely, Your Honor. We try cases in immigration court all the --

THE COURT: Do you have anything that stands for that proposition?

MR. SURIEL: I could certainly brief that issue. I can certainly provide you -- I wasn't -- what I was prepared to --

THE COURT: I mean, isn't that really -- doesn't that really go to the heart of his -- and that assumes he had an agreement, which he's at least, although with a -- with even that, it's rather nonspecific, but assuming that he was promised -- assuming he was promised he would not be deported and he now claims to have relied on that to his detriment by not pursuing the other remedy of asylum, isn't that a sine qua non to your claim that he would have been able to make a colorable claim to asylum, and if so, wouldn't the heart of that be basically the right of a snitch to asylum?

MR. SURIEL: Well, Your Honor, the primary -- I mean, it's uncontested -- it's uncontroverted that he, in fact, helped the government. In fact, the letters that

the attorneys wrote, I mean, he has done his part of the quid pro quo. Now --

THE COURT: I'm giving you that for purposes of this discussion. I'm going the next step and saying assuming all that and he now says because of all that I gave up my right to asylum --

MR. SURIEL: Right. Because the way that the asylum laws have changed, when he would have applied for asylum back in the early 1980s he wouldn't have been precluded as he is now, as he is as post-1988 when the definition of aggravated felony came into effect; also, the one-year bar to asylum application.

So it is a significant statutory right that he had which he gave up which the government knew or failed to advise him of that by going forward, by providing this testimony and by, you know, putting himself at risk -- in fact, if you read his affidavit --

THE COURT: I did.

MR. SURIEL: -- he was offered a deal by the DEA fairly early on and he refused that deal because he couldn't simply return to -- in other words, he couldn't cooperate with the government and then return to England as they wanted. I mean, they would -- they would have given him leniency in the criminal proceedings.

I do agree with you that the -- that the case law that you're looking for is very relevant. I can tell you, as someone who practices regularly before immigration courts and I've tried numerous political asylum cases,

that it is very often the case that someone cannot return back to their home country either because of activities they've done in this country, because of clubs, organizations they've joined while they've been in this country, which then subjects them to persecution back home. That's a very common thing in asylum law.

So it isn't -- it isn't so rare for -- in what you're saying in regards to that he would be a class of one in that he or somebody who has created his own problem by creating persecution back in his home country.

THE COURT: Well, now that you're mentioning it, I do recall having a case where someone was claiming asylum because they would -- and if they were returned to Columbia that might face dangers at the hands of a drug lord, although I never -- I don't remember getting a briefing on it, but as I now think about it that would be -- that would be -- that would be analogous.

MR. SURIEL: Yes, Your Honor. So it isn't as rare as perhaps you might think.

The other thing is that his statutory right to apply for political asylum in the 1980s was made in reliance to the promise he was made by the government, and the relevant case law is Santobello versus New York, 404 U.S. 257. The United States Supreme Court enunciated the well-established principle under the fundamental fairness doctrine of the Fifth Amendment that when the government makes a promise that induces someone to relinquish constitutional or other rights that promise must be fulfilled.

Now, Your Honor, if I could --

THE COURT: I apologize for interrupting again, but on that point, was there -- and I understand the practical argument that they've, in your client's eyes, made him a promise that he won't be deported so whatever other opportunities he had he's thinking to himself I got their assurance so I don't need to pursue them. My question is, was there anything about the nature of that promise or the nature of that cooperating agreement that would have precluded him from pursuing his asylum claim?

In other words, he's saying he's now gotten some good advice from the likes of someone such as yourself and says, yeah, I understand the government's making this promise but let's have a backup plan, let's go ahead and pursue the asylum. Anything inconsistent with that promise with going ahead and pursuing the asylum plan?

MR. SURIEL: Only to the extent that he was, you know, actively cooperating and in Montana and then having to come back to California. So there was a lot going on regarding his cooperation.

When I've talked to him -- in fact, Your Honor, one of the things I've wondered about is whether an evidentiary hearing before the magistrate where Mr. Morgan would testify is appropriate.

What basically happened is that time went by and, you know, Immigration contacted him in 1988 or different points in time and essentially until the year 2001 he understood that the agreement was still in

force and in effect and therefore he had no reason, that was the thing, that he was lulled into believing that everything was fine .

Your Honor, I know that one of the difficult parts about this case is the lack of written documentation, and if I could, what I have here is the modified judgment and commitment that Judge Keep -- Judge Keep held a hearing on the 21st of February of 1984, and this exhibit in that criminal proceeding was Exhibit 275. I do have copies for the Court and for the U.S. Attorney.

Your Honor, I have tried very diligently to get some of these documents because I think that the transcript of this proceeding that occurred on the 21st of February of 1984 would be very helpful because it would tell us some of the things that were discussed, some of the things that the judge took into consideration when she modified the judgment and commitment.

Unfortunately, every single transcript, every single piece of paper related to this proceeding back in 1982-83 have been lost or misplaced. I have spent weeks with the court -- the transcripts coordinator for the Southern District of California, a woman by the name of Jean McDonald, and she was very helpful and she was very apologetic but no single transcript remains or is available about this proceeding.

So it -- but for the age of this case where many and all of the players have either retired, passed away, have -- cannot be located -- now, I know the U.S. Attorney yesterday got some affidavits which -- which

are now before the Court, but, quite honestly, what took place during this criminal proceeding and the cooperation that Mr. Morgan provided is unfortunate, to our detriment, because none of that paper is available.

THE COURT: What are you thinking or hypothesizing might be found in that transcript that would be useful?

MR. SURIEL: I believe that the contents of and the agreement that was made would have been the basis upon which this judge, Judge Keep, in February 21st of '84, would have taken some of that evidence into consideration in modifying the judgment of Mr. Morgan.

THE COURT: This was some type of -- what was the nature of the hearing?

MR. SURIEL: Your Honor, if -- I do have copies and I'm not sure if you're going to admit those. Can I approach?

THE COURT: You may approach.

Do you want this marked as an exhibit or do you have --

MR. SURIEL: I do, Your Honor.

THE COURT: Is this one to be marked?

MR. SURIEL: Yes, Your Honor.

Particularly on that exhibit, Your Honor, where the Court indicates that now on this 21st day of February, 1984, it appearing to the court to be in the interest of justice to modify the sentence heretofore imposed.

We believe that some testimony would have been taken, some evidence would have been presented at that hearing which would have given some details of Mr. Morgan's cooperation agreement which would have been presented that day.

Your Honor, the other important point, I believe, is that the Ninth Circuit decision in Thomas versus INS, 35 F.3d. 1332, a 1993 decision, that decision by the Ninth Circuit did not limit the ambit of cooperation agreements to written agreements. We believe that it is well-settled law that binding contracts and agreements do not necessarily need to be reduced down to writing, which, of course, is part of the problem here.

I believe that if we had the ability to get some of the transcripts of what occurred in the early '80s of his proceedings that more light would be shed, but, as I say, Mr. Morgan probably would be the best person to testify as to the agreement that he believed and he understood that he was entering with the government.

Lastly, Your Honor --

THE COURT: Let me just ask a really basic question that probably is answered in your papers and I just didn't seize on it adequately, but does your argument depend on promissory estoppel or does your argument -- or can your argument independently

stand -- I should say your position, your client's position, can it independently stand on purely a -- I'll call it a contract. In other words, is it enough that your client could prove that the agreement was he would not be deported? In other words, will that, standing alone, suffice perhaps under the Thomas case?

MR. SURIEL: I believe so, Your Honor. I believe that that is the case law that we are -- that we're attempting to rely upon, and that is an agreement, contract is sufficient to -- for Mr. Morgan to be able to go forward and be able to remain the United States.

Lastly, Your Honor, I believe that a temporary restraining order is necessary to prevent Mr. Morgan from being summarily removed from his home of the last 25 years.

THE COURT: I don't want to get bogged down in terminology, but at least I announced at the outset that this was a hearing on the preliminary injunction, and as I understand it the government has basically committed not to remove or deport him until the Court rules in this proceeding.

Do I have that right?

MR. SURIEL: That's correct, Your Honor.

THE COURT: So really that would substitute for any temporary restraining order, would it not, and wouldn't this be more properly a preliminary injunction hearing today?

MR. SURIEL: Yes, Your Honor, although I'm concerned that if you were to rule that a temporary restraining order is not necessary the Immigration officials would take him into custody. So I'm simply trying to preserve the summary imposition of detention.

THE COURT: You're concerned not only about deportation, you're concerned about detention?

MR. SURIEL: Yes, Your Honor.

Well, I will tell you that there is -- there was a -- custody conditions placed on my client. We went to the Immigration. He's now required to pay a monthly visit there. But it's been my experience that any change in this court would allow them to take him into custody.

THE COURT: I interrupted you so often that --

MR. SURIEL: Thank you.

THE COURT: Did you finish what you were trying to say?

MR. SURIEL: Well, his home of 25 years where he has attained a senior management position at the American Express Corporation, has never again committed any offense or had any contact with law enforcement, for all intents and purposes has been a model citizen in helping fellow alcoholics and mentoring many and doing considerable good in the community. Also, he has a stable and nurturing relationship with a U.S. citizen spouse.

Your Honor, it seems evident that an evidentiary hearing perhaps be conducted by the magistrate where Mr. Morgan could testify and amplify his understanding with the government.

THE COURT: Thank you, Mr. Suriel.

Miss Parsons?

MS. PARSONS: Good morning, Your Honor.

First, whether looking at it either from a contract standpoint or an estoppel standpoint, petitioner has not provided sufficient evidence for this Court to rule in his favor on either side.

He claims that there was a verbal agreement that he would not be removed indefinitely as a result of his cooperation in the Montana case.

First, whether or not that agreement should or should not have been in writing is beside the point. The point is, other than petitioner's own self-serving affidavit there's no evidence of this agreement. Certainly, if that agreement had been entered into, verbal or otherwise, there would have been some memorialization of it somewhere. His former counsel would have referred to it in letters. He did not.

If it was this important, and I would wager to say that an agreement with the government that one would never be deported indefinitely is certainly more important than getting an agreement for change of venue and employment authorization, there would have been some memorialization of it somewhere, and

petitioner has not provided any memorialization of it, which means either, one, he never got it, or he didn't keep it, and yet he does have other letters regarding this case regarding other things.

Second, regarding whether or not he was precluded from pursuing his asylum case regardless of this agreement, no, he was not. In fact, even if he had never been placed in proceedings at all he could have affirmatively approached the Immigration and Naturalization Service and asked for asylum.

And certainly this Court's question was well taken. Given that he apparently did not have anything in writing, that certainly would have been the more prudent course of action, to have pursued his asylum claim regardless of whether or not he had this agreement. He did not.

Further, getting to whether or not he waived anything, at the time he was placed in proceedings in 1984 his case was immediately transferred to Montana where it was calendared on the docket and pleadings were never even taken, and therefore he never waived or did not waive anything in his immigration court. There simply was never a hearing scheduled. Had he wanted a hearing to have been scheduled, he could have requested calendaring of that case for the specific purpose of applying for asylum. We have no evidence that he did that.

What we do have evidence of with these affidavits of the United States Attorney who was in office at the time this prosecution in Montana occurred, the prosecuting attorney who prosecuted the case, and the

special agent in charge of the DEA of a very small two-man office who investigated the case is to the effect that, one, this is an old case and specific memories are not there; however, the U.S. Attorney and the Assistant U.S. Attorney prosecutor both stated in their affidavits that an agreement that an alien cooperating witness would never be deported as a result of cooperation was not the type of agreement that was the habit or practice of that prosecutor or that U.S. Attorney, that the types of agreements that they would have recommended and approved would have been agreements that the alien cooperating witness would not be deported for so long as his cooperation and testimony continued and that they would bring the nature and level of his cooperation to the attention of the INS when requested.

That is the type of agreement that was typical then and, frankly, it is the type of agreement that is typical now.

It strains logic to think that any U.S. Attorney or Assistant U.S. Attorney would enter into an agreement with someone who has already been prosecuted and convicted by jury, in other words, he didn't cooperate in his own criminal case, to now have this person who we've got, he's convicted, to say we will never deport you indefinitely because of your cooperation in this case.

THE COURT: What else did they have to offer him other than that? I mean, as you pointed out, he's already been convicted so it's not as if he can get a better deal. So what else did they have to offer him other than you'll never be deported?

MS. PARSONS: They had to offer him that when asked they would bring to the attention of the INS his significant cooperation in the case and ask that they take that into consideration, which is a typical, common agreement then and now, apparently, in the District of Montana and, frankly, in this district. That is a common habit and practice of U.S. Attorney's Offices.

Whether or not the INS would -- what would happen with that would be up to the trial judge at that time and then that would trigger the whole, you know, going to the BIA, then on to the Ninth Circuit and various other levels. However, that would have been what they had to offer.

THE COURT: What category of claim would he have had to make for that to be helpful? In other words, if he sought asylum, that would be on its own footing. So what kind of a claim for nonremovability, nondeportation, whatever it might be, would it be relevant to have the U.S. Attorney come in and say he was really helpful to us in this prosecution?

MS. PARSONS: Back during that time frame there were several different avenues that were available.

First, and I don't mean to get off subject but just give additional information -- I'm sorry. I've forgotten the exhibit number that was just introduced, but the most recent exhibit by the petitioner.

THE COURT: Exhibit 1.

MS. PARSONS: In that proceeding, they could have gone back to the judge and said we have this significant cooperation, we have all these great things that he did and we got this drug conspiracy, we would like you to do a judicial recommendation against deportation, and the judge -- that would be on motion. The INS would then come in and either -- you know, either consent to it or object to it, there would be a hearing, and if the judge entered the judicial recommendation against deportation, that is binding, that would have bound the INS and they could not have removed him.

In his immigration case, he could have requested deferral of removal. In fact, he could have even requested that outside of his immigration case simply by going to the INS district council, saying I'm asking the attorney general to defer removing me indefinitely because I have this significant cooperation and agreement with the DNA, the U.S. Attorney's Office, or whoever he believes he had it with, and my cooperation has been significant enough that you should do this.

We have no evidence that any of that ever happened, and petitioner has not even alluded to having done any of this.

Either way, the judicial recommendation against deportation or in his own immigration case he could have pursued these avenues, and, as I stated, he could have independently requested asylum regardless of whether he was placed in proceedings or not.

However, getting specifically to the asylum claim, what petitioner has to show is that he is a member of one of the protected classes: Race, religion, sex, national origin, political opinion, and membership in a particular social group. What I believe he's trying to say is that he would be a member of a particular social group of convicted drug offenders who snitch on other convicted drug offenders, and I'm not aware of a single case ever in which that has been deemed to be a particular social group.

In fact, there is a Third --

THE COURT: It's sort of an antisocial group, isn't it?

MS. PARSONS: Pardon me?

THE COURT: Be sort of an antisocial group, wouldn't it?

MS. PARSONS: I would think that would be a good characterization of it.

There is a Third Circuit case, J-E-A-N E-L-I-E-N, and I do apologize, I don't have the cite right in front of me, in which in that court it involved asylum, withholding, deferral under the Convention Against Torture, and in part held that Haitian criminals who were subsequently deported to Haiti did not belong to a particular social group because once they were deported to Haiti Haitian officials tended to round up the criminal aliens and detain them. It specifically found that criminal aliens were not members of a particular social group.

There have been cases, and I do not believe, again, that this is a Ninth Circuit case, and I apologize, the name of it is not coming to mind, which held that drug offenders are not members of a particular social group.

THE COURT: As you heard me recall for Mr. Suriel, and I do not remember the outcome of this case either in my court or the higher court, but I do remember a situation where one was seeking asylum because to be deported -- that person was going to be deported to Columbia and because of their testimony was claiming the --

MS. PARSONS: Yes, Your Honor.

THE COURT: -- potential execution back in Columbia.

MS. PARSONS: Yes. I do remember that case. And I apologize. I don't remember the name of it either. But in that case it was a Convention Against Torture case and what that alien was claiming is because she was snitching on the Columbia drug cartel in Columbia who had agents here in the United States that she would be tortured in Columbia as a result and that her torture would be something that would be at the behest of or with the acquiescence of the government of Columbia.

I think we all can make the reasonable distinction between Columbia and Great Britain.

And plus, I do not believe that petitioner in this case has made any claim to Convention Against Torture or claiming that agents of the drug cartels in

United Kingdom are over here actively seeking snitches.

The fact is that criminal snitches are not a particular social group, and unless petitioner could come up with some better plausible claim to asylum he cannot show prejudice, and without prejudice he cannot show a violation of due process.

Going back, however, to the agreement, there should at least be some reasonable evidence that the agreement that he claims he has actually exists.

The evidence that we have is him claiming that it exists and the United States Attorney, the prosecutor and the DEA agent saying no such agreement ever existed.

THE COURT: Well, isn't it -- I mean, first of all, it does seem to me that this particular discussion is going to the weight of the evidence and quality of the evidence rather than whether or not there is any evidence of a contract.

It seems to me we have -- and I read pretty carefully his affidavit in which he says -- in fact, I think probably Paragraph 7, as I recall, is as specific as he gets, which has really got to be read in connection with Paragraph 5.

In Paragraph 5 he says, "That what I wanted in return for my cooperation and made clear to the government is that I would assist them in exchange for being able to stay in legal status in the United States without being deported."

And then Paragraph 6.

"That given the fact that this was my one and only conviction and that I was eligible to be released from prison and be deported to my home country of England after serving a portion of the sentence, which I was very close to completing before I entered into this agreement with the United States government."

And then Paragraph 7.

"That it was made clear to me that I would be allowed to stay in the U.S. and not be deported in exchange for the testimony I provided and the assistance I provided to the government."

Then eight says:

"That I was distinctly promised that I would be allowed to stay and work in the U.S. and not be deported to England."

So it seems to me he's making a fairly -- a fairly assertive claim that there was a contract in that return for his testimony, that being the consideration, he was promised he would never be deported.

And that is then met with -- and I'm not faulting Dunbar or the others because, heaven only knows, to recall what took place back then would be a stretch for any of us, but basically that's being met with not a specific denial, no, I never said that, but rather, normally it was our habit and practice to do such and such and it was never our habit to do that type of thing.

MS. PARSONS: I understand that.

I don't mean to necessarily argue the weight of the evidence. I was going more to the fact that in order to benefit from estoppel the petitioner would have to show affirmative, deliberate misconduct , deliberate lies under that, and he has not shown that.

But, however, to answer your specific question, Your Honor --

THE COURT: He has to show lies?

MS. PARSONS: No, Your Honor. He -- what we see is his memory of what the agreement was.

THE COURT: Right.

MS. PARSONS: But if you want to look -- Mr. Zimmerman and Mr. Dunbar obviously do not have specific memories of that case, so it is a habit. Look, however, at Mr. Friend's declaration. He was the DEA agent. And I believe at some portion in Mr. Morgan's declaration he refers to the agreement being with the DEA. Mr. Friend is very specific and does remember some specifics about this case, even a small conversation he had with the petitioner regarding why he got involved in a drug conspiracy in the first place. Mr. Friend recalls that Mr. Morgan told him it was because he wanted to buy a pub in England and at that time they cost about $50,000.

Mr. Zimmerman does not swear according to habit and practice. He remembers that he did not make such a recommendation to the prosecutor and would not

have made such a recommendation to the prosecutor and further refused to sign a letter to that effect when asked by -- when his secretary was contacted after he had just retired when petitioner's immigration case first got going.

So, yes, we do have some nonspecific memories on behalf of Zimmerman and Mr. Dunbar. However, I believe they can testify as to their habit and practice, which they did. Mr. Friend, however, has specific memory and he denies that such an agreement ever existed.

So, yes, we do have a difference of opinion or a difference of memory of what the agreement constituted. My point is that when you have two different versions or difference in memory, that doesn't actually mean either person is wrong. It just means there's two different memories of what occurred.

And for the petitioner to benefit from estoppel against the government, he has to show affirmative misconduct, a pattern of misconduct, or some intentional malfeasance on the part of the government to estop us from removing him, and he has not.

THE COURT: Well, I asked Mr. Suriel this, as to whether one in his client's position could prevail even absent promissory estoppel, because I realize that normally promissory estoppel is a substitute for contract failings. You have promissory estoppel when there is no consideration, if I remember my law school correctly. So I suppose in a way they're really independent theories. So my question was to him was, well, if you can show to the satisfaction of a court that

you had a contract, then is that enough on its own to sustain his position even without promissory estoppel?

MS. PARSONS: He would have to show that if he had a contract, and our position would be that he has not sufficiently shown that. He has shown that he -- what he thought he had, and our evidence is what our witnesses say he had.

So we -- plus, when you look at his exhibit that he just said, there's nowhere in those minutes that references why the judge was changing or modifying the judgment. Judges do modify judgments. In fact, it is quite likely that petitioner's cooperation in the Montana case was brought to the attention of the court in San Diego. That's entirely possible. And, in fact, I would even go so far as to say likely that that is why the judgment was modified.

There's nothing in there indicating that it was modified because he was promised that he would never be deported from the United States indefinitely.

In fact, that wouldn't have even been germane to the modification of the sentence. It may have been mentioned but it wouldn't -- I doubt that it would have even been mentioned. The focus of that hearing would have been on the level and nature of his cooperation and why the judgment should now be modified in the interests of justice.

And the fact is, there is no evidence that he had any kind of agreement that he would never be removed.

And in his declaration that Your Honor was just referring to he said it was his strong desire that he be able to remain in the United States in legal status.

What's his legal status? He doesn't have any. In other words, he has no legal status. Did he ever go to the INS and say I have this agreement with the DEA, U.S. Attorney's Office or whomever that I will never be deported and I'm supposed to have legal United States, please provide me with my green card?

There is no evidence that he ever did that. He doesn't have a green card and he has no legal status.

So, in other words, we're supposed to believe that this petitioner, who believed he was supposed to be granted legal status, has no green card, has never had a green card, and apparently has never requested a green card, and yet believes he had an agreement with the United States he would never be deported, forever, and would have legal status.

I'm sorry, Your Honor, I don't think that these circumstances lend themselves to that kind of assumption, and that's basically what we're asked to make, is these assumptions.

What we're saying is, one, there's no sufficient evidence of a contract or the parameters of the contract according to what petitioner claims they are. Two, there's not sufficient evidence being brought forth to establish promissory estoppel. And what's more, there's no sufficient evidence presented to show that he had any plausible claim to relief under asylum.

And just very briefly, I would like to touch upon the reference to Thomas.

Thomas was a case that dealt with a negotiation and agreement in a plea agreement that an alien would not be deported as a result of a specific crime charged and for which he was pleading guilty to in that plea agreement. It was done without the written consent of the INS.

Later, when someone tried to place him in proceedings there was litigation regarding whether or not that plea agreement was binding on the INS without their agreement.

I believe at that time there was a mention -- I don't even believe it was in a regulation. I think it was only in the U.S. Attorney's manual suggesting or, depending on who you listen to, mandating that you get the written agreement of the INS. Apparently, the U.S. Attorney's Office did not in that case.

What the Ninth Circuit found was that the inherent authority of the United States Attorney to prosecute cases and enter into agreements encompassed the ability to bind other agencies unless that -- in absence of a specific delegation saying that they couldn't, they found there was no specific delegation.

Later, I believe it was even the next year, there was a Fourth Circuit case which basically held exactly the opposite, saying no, the U.S. Attorney didn't have authority to do that.

No one sought cert in Thomas for reasons I do not know. They did seek cert in the Fourth Circuit case but cert was denied. So now we had the Fourth Circuit saying one thing and the Ninth Circuit saying another and no way to get between the two.

And in 1995 the Attorney General did specifically delegate that authority to enter into agreements regarding whether or not an alien can be deported for a specific offense in a plea agreement and delegated it only to the Commissioner of the INS. It has never been subdelegated.

So I know that was going a little bit beyond the scope, but I just wanted to give sort of the history there.

So what I'm saying is that Thomas really doesn't help us very much here because, one, there was no plea agreement, the petitioner did not plead guilty, he was convicted by jury, and so it didn't even involve the inherent authority of the U.S. Attorney.

I would concede that under Thomas, even though Thomas came out, I think, almost ten years after these events we're discussing in 1984, that according to Thomas that had the U.S. Attorney entered into such an agreement that it most likely would have been binding.

What we're saying is we have no evidence that the U.S. Attorney, the Assistant U.S. Attorney, and specifically the DEA ever entered into such an agreement and we're saying that it makes no logical sense that they would, and that other events that did

not occur, such as not requesting a JRAD, not having any memorialization, never requesting a green card, indicate that the parameters of that agreement were not quite as broad as the petitioner claims they are.

THE COURT: Help me re-establish the legal framework we're in today I raised with it Mr. Suriel, and that is, are we really conducting a preliminary injunction hearing or a temporary restraining order?

MS. PARSONS: It is my understanding we're conducting a preliminary injunction hearing.

THE COURT: That was mine, too.

And so the standard would still be, then, either establishing a -- the petitioner would either have to establish a probability of success on the merits and possibility of irreparable injury or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor.

MS. PARSONS: Yes, Your Honor.

THE COURT: All right. Anything further?

MS. PARSONS: No, only to say that, in regard of balancing the hardships, we would suggest that because petitioner did file this petition while he was still in the United States that this Court will not lose jurisdiction if he was removed to Great Britain and that petitioner is represented by counsel and litigation on this case could continue. That's the only additional point I would make.

THE COURT: Although on the subject of hardships or irreparable injury, it's not the mere fact of deportation that would be injurious to him but he's established himself in a successful career and -- I'm not sure -- let's see. I think I saw something that -- I believe his wife is a U.S. citizen. I'm not sure his ability to take her but it does strike me that the injury would be rather substantial if he was deported, notwithstanding the fact the Court might retain jurisdiction.

MS. PARSONS: The government would concede that the disruption to Mr. Morgan's life would be substantial. We would not disagree with that.

THE COURT: All right. Thank you.

Mr. Suriel, anything further?

MR. SURIEL: Yes.

Thank you, Your Honor. There are a couple things that must be clarified on this.

Number one, the letters that I obtained were gotten as a result of a FOIA that I filed to the INS. The entire file of former counsel who represented Mr. Morgan, that gentleman left private practice. In fact, he has no files. So the assertion that I could have gotten or that I got information on this file, but for the immigration file we got where the U.S. Attorney's letters were found, that was the place that I found them.

Secondly, there was no hearing held before an immigration judge before 2001. There was no way that

Mr. Morgan could have gone to an immigration judge or anyplace and said I need a hearing because in 1988 I'm going to lose the ability to file a political asylum application and in 1990 I'm going to lose the ability to ask for a JRAD. It is ludicrous to suggest that Mr. Morgan could have had an immigration hearing if the immigration had not placed him in proceedings in the year 2000.

The JRAD, the Judicial Recommendation Against Deportation, is no longer -- has not been available since, I believe, 1988.

Secondly, or the other important point, Your Honor, is in Exhibit 7 Mr. Morgan was given an unrestricted employment authorization.

Your Honor, immigration law is such that an unrestricted Social Security card such that he has essentially gives him legal status. You can have legal status in the United States by virtue of having a Social Security card, as he has, with no restrictions. People get Social Security cards that say not authorized to work without the following. This one does not. This is an unrestricted Social Security card. It does say in the document he got from the INS employment authorized.

He has legal status in the United States, Your Honor.

The bottom line with this case is that so much that impacts him is precluded, is unavailable, is not anything that he could -- the only thing we have, Your Honor, and I agree, is to make this claim that he had

an agreement, he had an understanding, and he relied -- to his detriment he relied on that agreement.

And that's really the heart of this case.

THE COURT: All right. I'll take this matter under advisement and issue an order as quickly as I can.

Anything further?

Then we're in recess.

(Proceedings recessed at 9:21 a.m.)

CERTIFICATE

I, DAVID C. GERMAN, Official Court Reporter, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the proceedings and testimony reported by me on the date specified herein regarding the afore-catpioned matter are contained fully and accurately in the notes taken by me upon said matter; that the same were transcribed by me with the aid of a computer; and that the foregoing is a true and correct transcript of the same, all done to the best of my skill and ability.

DATED at Phoenix, Arizona, this 11th day of May,

DAVID C. GERMAN, RMR, CRR
OFFICIAL COURT REPORTER

APPENDIX E

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Suriel, Nicomedes E., Esquire
200 East Mitchell Drive
Suite 201
Phoenix, AZ 85012-0000

Office of the District Counsel/PH
P.O. Box 25158
Phoenix, AZ 85002

Name: DURHAM-MORGAN, PAUL A24-299-945

Date of this notice: 10/12/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/
Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
HESS, FRED

[Stamp, Received]

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A24 299 945 - Phoenix Date: OCT 12 2004

In re: PAUL DURHAM-MORGAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Nicomedes E. Suriel, Esquire

ON BEHALF OF DHS:
John Barkley
Assistant Chief Counsel

CHARGE:

Notice: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Nonimmigrant - remained longer than permitted

Lodged: Sec. 241(a)(2)(A)(i), I&N Act [8 U.S.C. § 1251 (a)(2)(A)(i)] - Convicted of crime involving moral turpitude[1]

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[1] The charge was not sustained.

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Remand

ORDER:

PER CURIAM. The appeal is dismissed. We affirm the Immigration Judge's finding that the respondent is an alien convicted of an aggravated felony due to his federal convictions for conspiracy to illegally import a controlled substance conspiracy to possess a controlled substance with intent to distribute (I.J. at 1; Exhs. 10-11).

The respondent's request to remand the record to the Immigration Judge is denied. First, jurisdiction to grant an S visa lies with the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service), not the Immigration Judge. *See* 8 C.F.R. § 214.2(t)(4). Next, although the respondent requests a remand to redress alleged ineffective assistance of his criminal defense attorney in 1982, such redress would lie with the criminal courts, not with the Immigration Judge.

Finally, with respect to the respondent's constitutional arguments, we note that, as a general rule, this Board is without jurisdiction to entertain such arguments. *See Matter of Nolasco*, 22 I&N Dec.

632, 641-42 (BIA 1999); *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997). Accordingly, the appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX F

SWORN AFFIDAVIT

STATE OF ARIZONA)
) SS:
COUNTY OF MARICOPA)

AFFIDAVIT OF MR. PAUL MORGAN

I, Paul Morgan, residing in Maricopa County, Arizona after being duly sworn, depose and say:

1. That I was a named defendant in a federal court trial number 82-0164-K.

2. That in October 1982 a jury found me guilty of the offense of conspiracy to illegally import a controlled substance.

3. That I was sentenced to five years in prison.

4. That I agreed to cooperate and assist the government through the Drug Enforcement Agency and the US Attorney's office in Montana in their prosecution of other individuals who were part of the conspiracy that I had some knowledge of.

5. That what I wanted in return for my cooperation and made clear to the government is that I would assist them in exchange for being able to stay in legal status in the United States without being deported.

6. That given the fact that this was my one and only conviction and that I was eligible to be released from prison and be deported to my home country of England after serving a potion of the sentence, which I was very close to completing before I entered into this agreement with the US government.

7. That it was made clear to me, that I would be allowed to stay in the US and not be deported in exchange for the testimony I provided and the assistance I provided to the government.

8. That I was distinctly promised that I would be allowed to stay and work in the US and not be deported to England.

9. That US Attorney Pete Dunbar wrote letters attesting to my cooperation and the beneficial nature of my testimony.

10. That I attended the hearing on the motion to reduce my sentence held on February 21, 1984 in the criminal trial I was a defendant in.

11. That the reason my sentence was reduced and I was allowed to stay and work in the US was based on the understanding, which I had worked out with the DEA where I would be allowed to remain in the US.

12. That about three days after I was arrested in Phoenix, the DEA offered me a deal if I testified against the other defendants. The deal was that if I testified they would let me out and allow me to return home to England. I did not accept the deal since returning to England was not an option for my wife, Cheryl, and I as some of the principles I would testify against were friends and partners of mine from London. Had we returned to London, our lives would be at risk. In fact one member of the team, Peter Land, was almost killed by a beating because he was suspected of stealing from the team (gang).

13. That as part of the deal I was given a social security number and permission to work in the US.

14. That from 1981 to 1985 I worked as a Property and Asset Manager for Joya Reality in Phoenix, Arizona with the work authorization I was provided by the INS.

15. That from 1985 to 1990 I worked as the General and Operations Manager, for a 350 unit cooperative apartment community under HUD section 231. It was also during

this time that I was elected president of the Institute of Real Estate Management ARM chapter in Phoenix. It was also during this time frame that I began my studies in business computer applications.

16. That from 1990 to 1993 I was the owner and manager of a landscape design and service company in Phoenix.

17. That I attended DeVry University in Phoenix full time and graduated 1993 with a Bachelor of Science in Computer Information Systems.

18. That from 1993 to 1997 I worked under contract for the State of Arizona, Department of Motor Vehicles (DMV) as a systems Programmer/Analyst.

19. That in 1994 I was promoted to senior Prograrnmer/Analyst.

20. That from 1997 to the present time I have been working for American Express Company (AXP). That I was hired as a consultant initially and that after 6 months I was offered a permanent position with AXP as a Senior Programmer/Analyst to lead a project on the Canadian Optima system. In 1998 I was promoted to Lead Programmer/Analyst. In 1999 I was nominated and accepted into the AXP Six Sigma program. In 2001 I was certified as a Six Sigma Black Belt. In 2003 I was

promoted to a Master Black Belt. The responsibilities of a Master Black Belt include teaching and certifying Black Belts, coaching and mentoring Black Belts through their careers.

21. That as part of my current functions and responsibilities I facilitate courses in reengineering techniques and application and improving business and systems processes. That in 2005 I expect to obtain Master Black Belt certification and expect a promotion to a Directorship.

22. That I have been married nineteen years to my US citizen wife.

23. That in 1987 I realized I was alcoholic and therefore made the decision to stop drinking and have been sober for over 18 years. In 1996 I joined Alcoholics Anonymous (AA) and have diligently learned and practiced the principles of a spiritual life in may daily affairs. I have gone to great lengths to turn my life around and provide a positive impact on society as a whole and the community. I now focus on being of service to others including working with other alcoholics. I have sponsored many men, some of whom remain sober to this day. I have also served as treasurer of my church, served as treasurer of the Phoenix AA Intergroup, served on a number of committees to arrange events for non profit charitable organizations, including working with

battered mothers and their children through my affiliation with the Make a Difference Foundation.

24. That I have worked diligently to rehabilitate myself after my one and only criminal arrest and conviction. That through deliberate decisions and with the help of others I have turned my life around.

25. That it came as a shock to me in the year 2001 when I learned I was being placed in deportation proceedings.

26. That I kept my end of the bargain with the DEA. Assisting in the investigation, testifying in and aiding in the prosecution of the government's case against others.

27. That I was made a clear promise to be able to stay in the US and not face deportation in exchange for my assistance. That I performed as I said I would.

I DECLARE UNDER PENALTY OF PERJURY THAT THE EVENTS DESCRIBED HEREIN ARE TRUE AND CORRECT.

/s/ 4/12/2005

Paul Morgan April 08, 2005

SUBSCRIBED BEFORE ME THIS 12th DAY OF April 2005.

MY COMMISSION EXPIRES: 07/07/07

/s/ Brenda P. Lovett - Notary

[Notary Seal]

APPENDIX G

SWORN AFFIDAVIT

STATE OF MONTANA)
) SS:
COUNTY OF YELLOWSTONE)

AFFIDAVIT OF PETE DUNBAR

I, Pete Dunbar hereby duly sworn and deposed, state the following:

1. My true and correct name is Pete Dunbar.

2. I was born on June 8, 1927, in Three Forks, Montana.

3. I currently reside at 2757 Gregory Dr. S., Billings, Montana 59102.

4. I held the position of U.S. Attorney's Office for the District of Montana from 1982 to December 31, 1997.

5. In 1983, I submitted two requests to the Immigration and Naturalization Service on behalf of Mr. Durham-Morgan to facilitate his assistance with a criminal case under investigation by the U.S. Attorney's Office.

6. During this investigation and prosecution of the above-referenced case, the U.S. Attorney's Office sought the assistance of Mr. Paul Durham-Morgan.

7. Because the U.S. Attorney's Office required Mr. Durham-Morgan to remain in Montana to provide information and assistance, I authorized a written request on March 23, 1983 to the Helena Office of the INS to transfer Mr. Durham-Morgan's case from the San Diego Office of the INS and to grant Mr. Durham-Morgan employment authorization so that he could support himself and his wife during our investigation and prosecution.

8. Subsequently, I authorized a written request on April 12, 1983, to the San Diego office of the INS to transfer Mr. Durham-Morgan's case to the Helena Office of the INS to facilitate our investigation and prosecution of the above-referenced case.

9. To qualify for "S" status, an individual must possess critical and reliable information about a criminal organization or enterprise, must be willing to or has supplied such information to state or federal law enforcement authorities, so that his/her presence in the U.S. is essential to the success of the law enforcement authority's investigation or prosecution.

10. I understand that Mr. Paul Durham-Morgan's immigration attorney has been attempting to obtain the necessary documentation and government support in order to secure an "S" visa on behalf of Mr. Durham-Morgan, given his critical role in one of the most important narcotics cases in Montana. Unfortunately, due to the time that this criminal prosecution occurred in the early 1980's, none of the critical players are still with the relevant law enforcement agencies, and no one currently at these agencies has been able to provide Mr. Durham-Morgan's attorneys with the necessary documents to secure an "S" visa.

11. Given these circumstances, and the fact that Mr. Durham-Morgan meets the "S" visa qualifications, I implore this immigration court to grant Mr. Durham-Morgan a constructive "S" visa.

I DECLARE UNDER PENALTY OF PERJURY THAT THE EVENTS DESCRIBED HEREIN ARE TRUE AND CORRECT.

/s/ _____ 3/26/03
Pete Dunbar Date

/s/ Gale Stott
SUBSCRIBED BEFORE ME THIS 26th DAY OF MARCH, 2003.

[Notary Seal]
MY COMMISSION EXPIRES: 12-17-2006

Gale Stott
Notary Public for the State of Montana
Residing in Yellowstone County
My Commission Expires 12/17/2006

APPENDIX H

Affidavit of Pete Dunbar

My true and correct name is Pete Dunbar, Byron H. Dunbar aka, I was born on June 8, 1927 in Three Forks, Montana, I currently reside at 2757 Gregory Drive S., Billings, Montana 59102. I held the position of U.S. Attorney for the District of Montana from 1982 to December 31, 1997.

I remember the name Paul Durham-Morgan and that he was a cooperating witness in a drug case. As the U.S. Attorney, I had the authority to enter into agreements with cooperating witnesses. These agreements were in writing. As the United States Attorney, I never approved an agreement guaranteeing that an alien cooperating witness in exchange for his cooperation, would never be deported. I do not remember entering into such an agreement with Mr. Morgan. I have not been shown a copy of any agreement between the government and Mr. Morgan regarding his cooperation and testimony and Mr. Morgan's deportation. These agreements usually were made in conjunction with a plea agreement. Mr. Morgan was not prosecuted by my office. Mr. Morgan's criminal cases were handled in the Southern District of California. He did not plead guilty and did not have a plea agreement. He was convicted by juries.

It was my habit and practice, when dealing with cooperating witnesses who were aliens, to agree that

the cooperating witness would not be deported for a long as their cooperation and possible testimony was needed. I would further agree to bring to the attention of the appropriate Immigration official the nature and level of the witness/alien's cooperation and ask that Immigration Official take the cooperation into consideration during deportation proceedings. It was not my habit or practice to enter agreements with alien cooperating witnesses stating that in exchange for their cooperation, they would never be deported.

In 1983, I submitted two requests to the Immigration and Naturalization Service on behalf of Mr. Durham-Morgan to facilitate his assistance with a criminal case under investigation by the U.S. Attorney's Office. During the investigation and prosecution of the above-referenced case, the U.S. Attorney's Office sought the assistance of Mr. Paul Durham Morgan. Because the U.S. Attorney's Office required Mr. Durham Morgan to remain in Montana to provide information and assistance, I authorized a written request on March 23, 1983 to the Helena Office of the INS to transfer Mr. Durham Morgan's case from the San Diego Office of the INS and to grant Mr. Durham Morgan employment authorization so that he could support himself and his wife during our investigation and prosecution.

Subsequently, I authorized a written request on April 12, 1983 to the San Diego Office to transfer Mr. Durham Morgan's case to the Helena Office of the INS to facilitate out investigation and prosecution of the above referenced case.

On March 26, 2003, I signed an affidavit in which I emphasized Mr. Morgan's cooperation and suggested a constructive S visa. Even without a written agreement to bring this to the attention of the Immigration authorities, I considered the March 26, 2003 affidavit part of my obligations as a former United States Attorney to acknowledge significant cooperation when asked to do so.

/s/ Byron H. Dunbar aka Pete
Pete Dunbar

SUBSCRIBED AND SWORN to before me this 9th day of May, 2005.

/s/ Gale Stott
Notary Public for the State of Montana
Residing at Billings, MT - Yellowstone County
My Commission Expires December 17, 2006

[Notary Seal]

GALE STOTT
Notary Public for the State of Montana
Residing in Yellowstone County
My Commission Expires 12/17/2006

APPENDIX I

Affidavit of Robert Zimmerman

I, Robert Zimmerman, Sanders County Attorney, Thompson Falls, Montana, , being first duly sworn upon oath, state that I was employed with the United States Attorney's Office (USAO), as an Assistant United States Attorney from 1974 thru 1988, prosecuting, among other things, drug cases. At the time germane to this affidavit, 1982-1984, I believe I was the only Assistant U.S. Attorney in the Billings, Montana office handling drug cases.

I remember the name Paul Durham-Morgan and that he was a cooperating witness in a drug case. I do not remember the specifics of that case. As an Assistant U.S. Attorney I did not have the authority, verbal or otherwise, to guarantee that an alien would never be removed if he were to be a cooperating witness.

I never recommended to the United States Attorney that an alien cooperating witness never be deported.

It was my habit and practice, when dealing with cooperating witnesses who were aliens, to recommend that the U.S. Attorney and INS agree the cooperating witness not be deported for a long as their cooperation and possible testimony was needed. I would bring to the attention of the appropriate Immigration official the nature and level of the witness/alien's cooperation

and ask that Immigration Official take the cooperation into consideration during deportation proceedings.

Even if I had the authority, I would never have given an alien blanket immunity from removal. Any recommendations I would have made of any kind regarding an alien would have dealt only with the specific case I was dealing with at the time.

/s/
Robert Zimmerman
Sanders County Attorney

SUBSCRIBED AND SWORN to before me this 4th day of May, 2005.

/s/ Suzanne Cooperman
Notary Public for the State of Montana
Residing at Trout Creek, Montana
My Commission Expires Jan 26, 2008

[Notary stamp]

APPENDIX J

Affidavit of Don Richard Friend

I, Don Richard Friend, having been duly sworn state the following:

On June 17, 1957, I became a Border Patrol Agent and served in that capacity at five duty stations on the Mexican and Canadian Border until May 7, 1967. On that date, I became a Criminal Investigator with the Customs Agency until September 16, 1973 when I transferred to the newly created Drug Enforcement Administration. On that date in 1973 I became the Acting Special Agent In Charge in the Great Falls, Montana office and in 1974 became the Special Agent In Charge. I held that position until January 2, 1984 when I retired.

During my time as Special Agent In Charge in Great Falls, Montana, I was involved in the investigation of and assistance in the prosecution of a major drug conspiracy in Montana. I do not remember all of the specifics of that case, however, I remember that the case involved a cooperating witness who was a native and citizen of England. That cooperating witness had been prosecuted and convicted by the U.S. Attorney's Office in San Diego, California and was providing information regarding the Montana conspiracy. I remember that this gentleman told me, at one point, that he became involved with the drug conspiracy to make enough money to buy a pub in England, which at

that time cost about $50,000. This man from England is Paul Durham Morgan.

As the Special Agent In Charge in Montana, I would have had the authority and responsibility for making recommendations to the prosecuting attorney and then to the United States Attorney regarding any agreement with cooperating witnesses. I never recommended to any prosecutor or to any United States Attorney that an alien who was a cooperating witness involved in a drug case be given an agreement that he would never be deported in exchange for his cooperating testimony. I did not make any such recommendation or such agreement in this case. Moreover, no one else on my staff made any such offer or agreement. I would have had to review and approve those recommended agreements.

I remember that at some time after I retired I was contacted by my former secretary, who advised me that Mr. Morgan had contacted her and wanted my address and phone number. I was told that he was facing deportation, and he wanted me to write a letter on his behalf. I refused to write such a letter, and in fact, informed her not to give him my address or phone number as I would not write such a letter.

Don Richard Friend /s/

SUBSCRIBED AND SWORN to before me this 9th day of May, 2005.

[Notary Seal]

/s/
Kerry Owens
Notary Public for the State of Oklahoma
Residing at Guthrie, OK
My Commission Expires: Feb 03, 2007

APPENDIX K

U.S. Department of Justice

[stamp - Received APR. 15, 1983]

United States Attorney
District of Montana

Post Office Box 1478
Billings, Montana 59103

April 12, 1983

John Williams
U.S. Immigration Judge
U.S. Immigration Court
5-N-44, 5th Floor
880 Front Street
San Diego, California 29188

Dear Judge Williams:

We have a request to ask that Paul Durham-Morgan and Cheryl Morgan case file be transferred from your jurisdiction to that of the State of Montana. Our request is based upon the fact that these are absolute necessary key witnesses in one of the most important narcotics cases to arise in the State of Montana. It would expedite and facilitate our investigation and is virtually imperative that we have

these persons in our jurisdiction for continuous interview, investigation and testimony before the Federal Grand Jury for the State and District of Montana.

Your assistance will be greatly appreciated, I cannot over-emphasize the importance of this investigation.

Sincerely,

/s/
PETE DUNBAR
United States Attorney

cc: Kermit Leibel

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 82-0164-K - Criminal

[Filed October 18, 1982]

United States of America	)
	)
v.	)
	)
PAUL DURHAM-MORGAN (4)	)
	)

On this 18th day of October, 1982 came the attorney for the government and the defendant appeared in person and with counsel, Warren Williamson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty

of the offense of conspiracy to illegally import a controlled substance, in violation of 21 USC 952, 960 & 963 as charged in count one, conspiracy to possess a controlled substance with intent to distribute, in violation of 21 USC 846 and 841(a)(1) as charged in count two, conspiracy to travel in interstate and

foreign commerce in aid of racketeering enterprises, in violation of 18 USC 371 and 18 USC 1952(a)(3) as charged in count 9, and travel in interstate commerce in aid of racketeering enterprises, in violation of 18 USC 1952(a)(3) as charged in counts 10 and 11 of the Superseding Indictment in 17 counts.

and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on counts 1, 2, 9, 10 & 11 the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on each of counts 1 & 2 concurrently the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years.

IT IS ADJUDGED that on each of counts 9, 10, & 11 concurrently with each other but consecutive to sentence imposed on counts 1 & 2, the imposition of sentence is suspended and defendant is placed on probation for a period of five (5) years on condition that he obey all laws, Federal, State, and Municipal, that he comply with all lawful rules and regulations of the probation department, that he not possess or use narcotics, marihuana, LSD, or dangerous drugs in any form, that he not associate with known users of or dealers in narcotics, marihuana, LSD, or dangerous drugs in any form, that he submit to search of his person, his personal effects, any vehicle in which he may be, and his residence at any reasonable time and

place by a probation officer, and that if deported, he not enter the United States without legal documents to do so.

IT IS ORDERED that probation supervision is waived if the defendant is deported.

IT IS RECOMMENDED that the defendant be incarcerated in a medium security facility.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

IT IS ORDERED, on motion of the U.S. Attorney, the underlying Indictment in this case as to this defendant is hereby dismissed.

/s/
JUDITH N. KEEP
United States District Judge
Filed: October 18, 1982
WILLIAM W. LUDDY, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

May 1981 Grand Jury

Criminal Case No. 82-0164-K

[Dated April 27, 1982]

UNITED STATES Of AMERICA,	)
Plaintiff,	)
	)
v.	)
	)
JOAO ANTONIO SOUSA LOPES,	)
MARCEL RAYMOND OBERLIN,	)
JOANN T. OBERLIN,	)
PAUL DURHAM-MORGAN,	)
JERRY MADSEN,	)
BOB MADSEN,	)
MELVYN STEVENSON,	)
ELVIA PAZ-REA,	)
THOMAS MILTON HAAS, JR.	)
CLIFF WOOD,	)
JOHN DOE, aka "Pucky"	)
Defendants.	)
	)

I N D I C T M E N T
(Superseding)

Title 21, U.S.C., Sec. 963 - Conspiracy to Illegally Import a Controlled Substance; Title 21, U.S.C., Sec. 846 - Conspiracy to Possess a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec.

841(a)(1) - Possession of a Controlled Substance with Intent to Distribute; Title 21, U.S.C., Sec. 843(b) - Unlawful Use of a Communication Facility; Title 18, U.S.C., Secs. 371 and 1952(a)(3) - Conspiracy to Travel in Interstate and Foreign Commerce in Aid of Racketeering Enterprises; Title 18, U.S.C., Sec. 1952(a)(3) - Interstate and Foreign Travel in Aid of Racketeering Enterprises; Title 21, U.S.C., Sec. 848 - Continuing Criminal Enterprise

The grand jury charges:
RE:dlw:San Diego

COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including April 12, 1982, within the Southern District of California, and elsewhere, defendants JOAO ANTONIO SOUSA LOPES, MARCEL RAYMOND OBERLIN, JOANN T. OBERLIN, PAUL DURHAM-MORGAN, JERRY MADSEN, BOB MADSEN, MELVYN STEVENSON, ELVIA PAZ-REA, THOMAS MILTON HAAS, JR., CLIFF WOOD, and JOHN DOE, aka "Pucky", did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to knowingly commit offenses against the United States, namely, to knowingly and intentionally import approximately 30 kilograms of cocaine, a Schedule II Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952, 960, and 963.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed within the Southern District of California and elsewhere:

1. In early January 1978, in Salt Lake City, Utah, defendants MARCEL RAYMOND OBERLIN and JOANN OBERLIN recruited Katherine Boyle as a cocaine courier to be paid $5,000.00 upon delivery of six pounds of cocaine smuggled from Panama into the United States.

2. On or about January 15, 1978, Katherine Boyle traveled to San Francisco, California, where she met with Thomas Sayes, III and defendants MARCEL RAYMOND OBERLIN and JOANN OBERLIN, and planned the smuggling of cocaine from Panama into the United States.

3. On or about January 17, 1978, Thomas Sayes, III and Katherine Boyle flew from San Francisco, California, to Los Angeles, California, and then on to Panama.

4. On or about January 20, 1978, in Panama, Thomas Sayes, III obtained and strapped to the body of Katherine Boyle approximately two kilograms of cocaine.

5. On or about January 20, 1978, Thomas Sayes, III and Katherine Boyle, transporting

the approximately two kilograms of cocaine, flew from Panama to the Los Angeles International Airport, Los Angeles, California.

6. On or about June 1978, in Haywood, California, defendant MARCEL RAYMOND OBERLIN possessed approximately three kilograms of cocaine.

7. On or about June 1978, in Haywood, California, defendant MARCEL RAYMOND OBERLIN sold one ounce of cocaine in exchange for approximately $1,700.00.

8. On or about March 1981, defendant MARCEL RAYMOND OBERLIN and Victor Loh traveled from San Francisco, California, to Miami, Florida, and then to Bolivia, transporting approximately $240,000.00 cash to be used to arrange the importation of cocaine into the United States.

9. On or about April 9, 1981, in Concord, California, Victor Loh, and defendant THOMAS MILTON HAAS, JR., on behalf of defendant MARCEL RAYMOND OBERLIN, rented a Cessna 210 Aircraft, FAA #N6156Y, to be used to smuggle cocaine from South America into the United States.

10. On or about April 10, 1981, in Concord, California, defendants MARCEL RAYMOND OBERLIN and THOMAS MILTON HAAS,

JR. met with Victor Loh and took possession of the Cessna 210 Aircraft, FAA #N6156Y.

11. On or about April 1981, in Mobile, Alabama, defendant MARCEL RAYMOND OBERLIN had John Cutts install a long-range fuel system in the Cessna 210, FAA #N6156Y.

12. On or about April 1981, on the West Caicos Islands, defendant THOMAS MILTON HAAS, JR., with defendant MARCEL RAYMOND OBERLIN aboard, landed the Cessna 210 Aircraft, FAA #N6156Y.

13. On or about April 1981, on the West Caicos Islands, defendant MARCEL RAYMOND OBERLIN showed Bill Dickson two cashier's checks, each in the amount of $75,000.00, and two kilograms of cocaine paste.

14. On or about April 1981, defendant THOMAS MILTON HAAS, JR., in a rented aircraft, flew defendant MARCEL RAYMOND OBERLIN, Bill Dickson and Bob Steenbock from the West Caicos Island to Winter Haven, Florida.

15. On or about April 1981, defendant MARCEL RAYMOND OBERLIN telephonically contacted Victor Loh in California, and instructed Victor Loh to stall the party from whom the Cessna 210 Aircraft, FAA #N6156Y, had been rented.

16. On or about May 1981, defendant MARCEL RAYMOND OBERLIN recruited defendants CLIFF WOOD, and JOHN DOE, aka "Pucky", and John Cutts, and Robert Steenbock to assist him in smuggling cocaine into the United States for distribution.

17. On or about May 1981, in Mississippi, John Cutts and Robert Steenbock, on behalf of defendant MARCEL RAYMOND OBERLIN, arranged for the rental of two airplanes, a 210 and a 182, to be used by defendants MARCEL RAYMOND OBERLIN, CLIFF WOOD, and JOHN DOE, aka "Pucky", to import cocaine into the United States for distribution.

18. On or about June 11, 1981, defendant MARCEL RAYMOND OBERLIN met with defendants CLIFF WOOD, JOHN DOE, aka "Pucky", and Robert Steenbock in Fort Pierce, Florida, to make additional arrangements for the importation of cocaine into the United States.

19. On or about June 13, 1981, defendants MARCEL RAYMOND OBERLIN and CLIFF WOOD, in the 210, departed Fort Pierce, Florida, traveling to Bolivia to obtain cocaine for importation into the United States for distribution.

20. On or about June 14, 1981, as previously instructed by defendant MARCEL RAYMOND OBERLIN, defendant JOHN

DOE, aka "Pucky", and Robert Steenbock, in the 182, departed Fort Pierce, Florida, and travelled to the West Caicos Island to await the arrival of defendants MARCEL RAYMOND OBERLIN and CLIFF WOOD with the cocaine to be imported into the United States for distribution.

21. On or about June 14, 1981, Robert Steenbock parachuted from the 182 onto the West Caicos Island, and cleared the runway allowing defendant JOHN DOE, aka "Pucky" to land an airplane on the island.

22. On or about June 14, 1981, on the West Caicos Island, in preparation for the arrival of defendants MARCEL RAYMOND OBERLIN and CLIFF WOOD with the cocaine, defendant JOHN DOE, aka "Pucky", and Robert Steenbock siphoned gas out of the 182 airplane and filled several fuel containers to be used to refuel the 210 upon its arrival.

23. On or about June 17, 1981, transporting approximately 140 pounds of cocaine paste aboard the Cessna 210, defendants MARCEL RAYMOND OBERLIN and CLIFF WOOD arrived at the airplane refueling stop on the West Caicos Island.

24. On or about June 20, 1981, defendant MARCEL RAYMOND OBERLIN instructed Robert Steenbock to travel to California for a debriefing regarding the theft of the

approximately 140 pounds of cocaine on the West Caicos Island on or about June 17, 1981.

25. On or about June 20, 1981, in Los Angeles, California, defendants CLIFF WOOD, JOHN DOE, aka "Pucky", and Robert Steenbock traveled from Las Angeles, California, to San Francisco, California, to discuss with defendant MARCEL RAYMOND OBERLIN the theft of the approximately 140 pounds of cocaine paste.

26. On or about June 21, 1981, in San Francisco, California, defendant MARCEL RAYMOND OBERLIN and Victor Loh held a debriefing of Robert Steenbock regarding the theft of the approximately 140 pounds of cocaine on the West Caicos Island.

27. On or about July 1981, in Mobile, Alabama, defendant MARCEL RAYMOND OBERLIN held another debriefing of Robert Steenbock regarding the theft of the approximately 140 pounds of cocaine paste on the West Caicos Island.

28. On or about July 1981, in San Francisco, California, defendant MARCEL RAYMOND OBERLIN asked Jill Barbera to find someone who would loan him a passport which he could use to assist him in finding out what happened to the approximately 140 pounds of cocaine paste which had been taken from him on the West Caicos Island.

29. On or about July 13, 1981, in San Francisco, California, defendant MARCEL RAYMOND OBERLIN asked Jill Barbera to give him her passport just in case of an emergency.

30. On or about July 13, 1981, in San Francisco, California, defendant MARCEL RAYMOND OBERLIN obtained possession of Thomas Michael Thie's passport.

31. On or about July 13, 1981, in San Francisco, California, defendant MARCEL RAYMOND OBERLIN obtained possession of Jill Barbera's passport.

32. On or about July 1981, defendant JOANN T. OBERLIN and Victor Loh traveled from the United States to the South Caicos Island, Grand Trunk and Providencial, in an effort to determine who had stolen the approximately 140 pounds of cocaine paste from defendant MARCEL RAYMOND OBERLIN on the West Caicos Island.

33. On or about November 1981, in Durango, Colorado, defendants MARCEL RAYMOND OBERLIN, MELVYN STEVENSON and PAUL DURHAM-MORGAN met with Robert Lipton and planned the importation into the United States from Brazil of approximately 150 kilograms of cocaine paste and cocaine hydrochloride.

34. On or about December 5, 1981, using a counterfeit British passport, Robert Lipton

traveled from the United States to Rio de Janeiro, Brazil to arrange for the importation into the United States from Brazil of approximately 150 kilograms of cocaine paste and cocaine hydrochloride.

35. On or about January 6, 1982, defendant PAUL DURHAM-MORGAN, in Phoenix, Arizona, spoke with Undercover Agent Magno, via telephone, and instructed him to inform Robert Lipton that "the man" said that the deal could go through.

36. On or about January 7, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno and agreed to provide Agent Magno with a sample quantity of cocaine.

37. On or about January 15, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno and delivered to Agent Magno approximately one gram of cocaine as a free sample.

38. On or about January 17, 1982, in Phoenix, Arizona, defendant PAUL DURHAM-MORGAN spoke telephonically with Agent Magno in San Diego, California, and agreed to travel to San Diego, California, to meet with Agent Magno.

39. On or about January 18, 1982, defendant PAUL DURHAM-MORGAN traveled from Phoenix, Arizona, to San Diego, California.

40. On or about January 18, 1982, in San Diego, California, defendant PAUL DURHAM-MORGAN met with Agent Magno at the Travelodge-Harbor Island to discuss the importation of 30 kilograms of cocaine.

41. On or about January 22, 1982, in San Diego, California, defendants MARCEL RAYMOND OBERLIN and PAUL DURHAM-MORGAN met with Agent Magno and agreed to furnish Agent Magno with $140,000.00 to be used by Agent Magno to purchase cocaine in Brazil for defendant MARCEL RAYMOND OBERLIN.

42. On or about January 22, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN, in exchange for a $100,000.00 loan, to be made in Brazil and used to purchase 30 kilograms of cocaine, agreed to secure the $100,000.00 loan with real property which he (MARCEL RAYMOND OBERLIN) owned.

43. On or about January 28, 1982, defendant PAUL DURHAM-MORGAN traveled from Arizona to San Diego, California, and met with Agent Magno and informed him that he would travel to Los Angeles and obtain $1,000.00 from a safe deposit box and send it to defendant JOAO ANTONIO SOUSA LOPES in Brazil.

44. On or about January 28, 1982, in Brazil, defendant JOAO ANTONIO SOUSA LOPES

spoke with Agent Magno in the United States and was advised by Agent Magno that defendant PAUL DURHAM-MORGAN would be sending him $1,000.00 as requested.

45. On or about January 29, 1982, defendant PAUL DURHAM-MORGAN traveled from San Diego, California, to Los Angeles, California, where he entered the Bank of America, Los Angeles International Airport Branch at 5930 W. Century Boulevard, Los Angeles, California.

46. On or about February 2, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN met with Agent Magno and in his (MARCEL RAYMOND OBERLIN's) own handwriting prepared a $100,000.00 promissory note and a real property mortgage to secure a $100,000.00 loan for the purpose of purchasing 30 kilograms of cocaine.

47. On or about February 2, 1982, defendant PAUL DURHAM-MORGAN traveled from Arizona to San Diego, California, where he and Agent D'Ulisse deposited two kilograms of cocaine into Safe Deposit Box #203 at the Security Pacific National Bank, 1200 Third Avenue, San Diego, California.

48. On or about February 2, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN met with Agent D'Ulisse at the

California First Bank, 530 B Street, San Diego, California, where defendant MARCEL RAYMOND OBERLIN deposited a $100,000.00 promissory note, a real property mortgage, and 10,000 shares of stock in Blue Creek Land and Cattle Company, Inc., into Safe Deposit Box #2426.

49. On or about February 2, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN met with defendant PAUL DURHAM-MORGAN and Agent D'Ulisse at the Security Pacific National Bank, 1200 Third Avenue, San Diego, California, and took delivery of a sample of cocaine for chemical testing.

50. On or about February 6, 1982, defendant MARCEL RAYMOND OBERLIN traveled from San Diego, California, to Miami, Florida.

51. On or about February 6, 1982, in Miami, Florida, defendant MARCEL RAYMOND OBERLIN met with Agent Magno and delivered approximately $50,000.00 cash to Agent Magno for transportation to Brazil as partial payment on 30 kilograms of cocaine.

52. On or about February 7, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno to collect $80.000.00 cash as front money for the delivery of 30 kilograms of cocaine.

53. On or about February 8, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno and took delivery of approximately $50,000.00 cash "front money" as partial payment for the delivery of 30 kilograms of cocaine.

54. On or about February 9, 1982, defendant PAUL DURHAM-MORGAN, in Phoenix, Arizona, spoke telephonically with Agent Magno regarding the pending 30 kilogram cocaine transaction.

55. On or about February 9, 1982, defendant JOANN T. OBERLIN travelled from the United States to Brazil.

56. On or about February 9, 1982, in Rio de Janeiro, Brazil, defendant JOANN T. OBERLIN met with Agent Magno and delivered $18,000 cash to Agent Magno as additional "front money" and partial payment on the purchase of 30 kilograms of cocaine.

57. On or about February 9, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno to determine if defendant MARCEL RAYMOND OBERLIN had arrived in Brazil with the remainder of the cocaine purchase money.

58. On or about February 10, 1982, in Rio de Janeiro, defendant JOANN T. OBERLIN

met with Agent Magno and advised him that her husband, defendant MARCEL RAYMOND OBERLIN, would be travelling to Bolivia to cash $110,000.00 in checks and would arrive in Brazil on Saturday.

59. On or about February 10, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno and took delivery of an additional $22,000.00 front money towards the purchase of 30 kilograms of cocaine.

60. On or about February 11, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES telelphonically informed Agent Magno that he (JOAO ANTONIO SOUSA LOPES) would be leaving for Sao Paulo, Brazil, to oversee the delivery of the first 10 kilograms of the 30 kilograms of cocaine.

61. On or about February 12, 1982, in Rio de Janeiro, Brazil, defendant JOANN T. OBERLIN met with Agent Magno and informed him that her husband, defendant MARCEL RAYMOND OBERLIN, would be arriving in Brazil on Monday, February 15, 1982.

62. On or about February 13, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES telephonically informed Agent Magno that he (JOAO ANTONIO SOUSA LOPES) was awaiting a call from

his Bolivian contact to confirm delivery of the first 10 kilograms of the 30 kilograms of cocaine.

63. On or about February 13, 1982, defendant MARCEL RAYMOND OBERLIN traveled from the United States to Rio de Janeiro, Brazil, to meet with defendant JOANN T. OBERLIN and Agent Magno to make arrangements for the importation of 30 kilograms of cocaine into the United States.

64. On or about February 13, 1982, in Rio de Janeiro, Brazil, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN met with Agent Magno to make arrangements with Agent Magno to show him the "safe house" and the clandestine aircraft landing strip.

65. On or about February 13, 1982, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN together with Agent Magno traveled to Saquarema and Arrurama, Brazil, to inspect the "safe house" and the clandestine aircraft landing strip where the 30 kilograms of cocaine would be loaded on an airplane for importation into the United States.

66. On or about February 14, 1982, in Rio de Janeiro, Brazil, defendant JOAO ANTONIO SOUSA LOPES met with Agent Magno and advised him that there had been a problem regarding the couriers who were to transport

the 30 kilogram of cocaine from Bolivia to Brazil.

67. On or about February 14, 1982, in Rio de Janeiro, Brazil, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN met with Agent Magno who informed them that there might be a problem with the cocaine couriers.

68. On or about February 15, 1982, in Rio de Janeiro, Brazil, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN met with Agent Magno to make alternative arrangements for the delivery in South America of 30 kilograms of cocaine.

69. On or about February 15, 1982, in Rio de Janeiro, Brazil, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN met with Agent Magno, who was advised by defendant MARCEL RAYMOND OBERLIN that he (MARCEL RAYMOND OBERLIN) planned to sell 5 kilograms of cocaine to obtain the additional funds necessary to finance the importation of an additional 40 kilograms of cocaine into the United States.

70. On or about February 16, 1982, in Sao Paulo, Brazil, defendants MARCEL RAYMOND OBERLIN and JOANN T. OBERLIN met with Agent Magno and agreed that rather than continue to deal with defendant ELVIA PAZ-REA, perhaps

they should attempt to secure an alternate source for the 30 kilograms of cocaine.

71. On or about February 17, 1982, in Sao Paulo, Brazil, defendant MARCEL RAYMOND OBERLIN met with Agent Magno and advised him that he (MARCEL RAYMOND OBERLIN) would be returning to the United States to arrange a sale of cocaine in order to obtain additional funds for the purchase of cocaine in Brazil.

72. On or about February 18, 1982, defendant MARCEL RAYMOND OBERLIN, using a United States passport in the assumed name Thomas Michael Thie, traveled from Brazil to the United States.

73. On or about February 19, 1982, in Sao Paulo, Brazil, defendant JOANN T. OBERLIN met with Agent Magno and informed him that she could not show the $100,000.00 cocaine purchase money wihtout defendant MARCEL RAYMOND OBERLIN's authorization, which she did not have.

74. On or about February 19, 1982, defendant MARCEL RAYMOND OBERLIN telephonically contacted Agent D'Ulisse in San Diego, California, and informed him that he (MARCEL RAYMOND OBERLIN) would come to San Diego, California, with two cocaine purchasers in order to purchase at least 2 kilograms of cocaine.

75. On or about February 19, 1982, in Sao Paulo, Brazil, defendant JOANN T. OBERLIN telephonically informed Agent Magno that she had spoken with her husband, defendant MARCEL RAYMOND OBERLIN, and he had instructed her not to show the $100,000.00 cocaine purchase money.

76. On or about February 19, 1982, defendant JERRY MADSEN traveled from Idaho to San Diego, California.

77. On or about February 19, 1982, defendant BOB MADSEN traveled from Idaho to San Diego, California.

78. On or about February 19, 1982, defendants JERRY MADSEN and BOB MADSEN registered in Room #302 at the Sheraton Inn-Harbor Island, San Diego, California.

79. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN met with defendants JERRY MADSEN and BOB MADSEN.

80. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN advised Agent D'Ulisse that two cocaine purchasers were in San Diego and had brought with them $110,000.00 to purchase 2 kilograms of cocaine.

81. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN advised Agent D'Ulisse that the two kilogram transaction for the $110,000.00 was necessary because he (MARCEL RAYMOND OBERLIN) had to take "2-1/4" ($225,000.00) "down" (to South America) in order to facilitate the larger transaction (30 kilograms of cocaine).

82. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN met with Agent D'Ulisse in Room #549 at the Sheraton Inn-Harbor Island, where defendant MARCEL RAYMOND OBERLIN informed Undercover Agent D'Ulisse that he (MARCEL RAYMOND OBERLIN) would take a sample of cocaine downstairs and have his people decide for themselves whether they were happy with the cocaine.

83. On or about February 19, 1982, in San Diego, California, defendant BOB MADSEN purchased one packet of closed-end capillary tubes.

84. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN conducted a test on a sample of cocaine.

85. On or about February 19, 1982, in San Diego, California, defendants JERRY MADSEN AND BOB MADSEN occupied

Room #302 at the Sheraton Inn-Harbor Island, which contained cocaine cutting and testing paraphernalia.

86. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN possessed the room key for Room #302 at the Sheraton Inn-Harbor Island, San Diego, California.

87. On or about February 19, 1982, in San Diego, California, defendant MARCEL RAYMOND OBERLIN possessed approximately $110.000.00 cash, which he delivered to Agent D'Ulisse for the purchase of 2 kilograms of cocaine.

88. On or about April 7, 1982, defendant ELVIA PAZ-REA met with Undercover Agent Frank Hobdy, posing as "The Frenchman," and discussed the purchase of the approximately 30 kilograms of cocaine.

89. On or about April 8, 1982, defendant ELVIA PAZ-REA met with Undercover Agent Frank Hobdy, posing as "The Frenchman," and discussed the purchase of the approximately 30 kilograms of cocaine.

COUNT TWO

Beginning at a date unknown to the grand jury and continuing up to and including February 19, 1982, within the Southern District of California, and elsewhere, defendants JOAO ANTONIO SOUSA

LOPES, MARCEL RAYMOND OBERLIN, JOANN T. OBERLIN, PAUL DURHAM-MORGAN, JERRY MADSEN, BOB MADSEN, MELVYN STEVENSON, THOMAS MILTON HAAS, JR., CLIFF WOOD, and JOHN DOE, aka "Pucky", did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

OVERT ACTS

In pursuance of the above conspiracy, and to further the objects thereof, the overt acts alleged in Count One, and realleged herein by reference, were committed in the Southern District of California and elsewhere.

COUNT THREE

On or about February 19, 1982, within the Southern District of California, defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally possess, with intent to distribute cocaine, a Schedule II Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

On or about February 19, 1982, within the Southern District of California, and elsewhere,

defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally use a communication facility, to wit, a telephone, in committing and in causing and facilitating the commission of the intentional importation of a controlled substance, and possession of a Controlled Substance with intent to distribute; in violation of Title 21, United States Code, Section 843(b).

COUNT FIVE

On or about February 19, 1982, within the Southern District of California, and elsewhere, defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally use a communication facility, to wit, a telephone, in committing and in causing and facilitating the commission of the intentional importation of a controlled substance, and possession of a Controlled Substance with intent to distribute; in violation of Title 21, United States Code, Section 843(b).

COUNT SIX

On or about February 19, 1982, within the Southern District of California, and elsewhere, defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally use a communication facility, to wit, a telephone, in committing and in causing and facilitating the commission of the intentional importation of a controlled substance, and possession of a Controlled Substance with intent to distribute; in violation of Title 21, United States Code, Section 843(b).

COUNT SEVEN

On or about February 19, 1982, within the Southern District of California, and elsewhere, defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally use a communication facility, to wit, a telephone, in committing and in causing and facilitating the commission of the intentional importation of a controlled substance, and possession of a Controlled Substance with intent to distribute; in violation of Title 21, United States Code, Section 843(b).

COUNT EIGHT

On or about February 19, 1982, within the Southern District of California, and elsewhere, defendant MARCEL RAYMOND OBERLIN did knowingly and intentionally use a communication facility, to wit, a telephone, in committing and in causing and facilitating the commission of the intentional importation of a controlled substance, and possession of a Controlled Substance with intent to distribute; in violation of Title 21, United States Code, Section 843(b).

COUNT NINE

Beginning at a date unknown to the grand jury and continuing up to and including February 19, 1982, within the Southern District of California, and elsewhere, defendants JOAO ANTONIO SOUSA LOPES, MARCEL RAYMOND OBERLIN, JOANN T. OBERLIN, PAUL DURHAM-MORGAN, JERRY MADSEN, BOB MADSEN, MELVYN STEVENSON,

ELVIA PAZ-REA, THOMAS MILTON HAAS, JR., CLIFF WOOD, and JOHN DOE, aka "Pucky", did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally travel in foreign and interstate commerce with intent to promote, manage, establish and carry on an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance, in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1), and 846, and to thereafter perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Sections 371 and 1952(a)(3).

OVERT ACTS

In pursuance of the above conspiracy, and to further the objects thereof, the overt acts alleged in Count One, and realleged herein by reference, were committed in the Southern District of California and elsewhere.

COUNT TEN

On or about January 18, 1982, defendant PAUL DURHAM-MORGAN did travel in interstate commerce from Phoenix, Arizona, to San Diego, California, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an

unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT ELEVEN

On or about January 28, 1982, defendant PAUL DURHAM-MORGAN did travel in interstate commerce from Phoenix, Arizona, to San Diego, California, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT TWELVE

On or about February 2, 1982, defendant PAUL DURHAM-MORGAN did travel in interstate commerce from Phoenix, Arizona, to San Diego, California, with the intent to promote, manage, establish, carry on, and facilitate the promotion,

management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT THIRTEEN

On or about February 6, 1982, defendant MARCEL RAYMOND OBERLIN did travel in interstate commerce from San Diego County, California, to Miami, Florida, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT FOURTEEN

On or about February 18, 1982, defendant MARCEL RAYMOND OBERLIN did travel in foreign commerce from Rio de Janeiro, Brazil, to San Diego, California, with the intent to promote, manage,

establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT FIFTEEN

On or about February 19, 1982, defendant JERRY MADSEN did travel in interstate commerce from Idaho to San Diego, California, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT SIXTEEN

On or about February 19, 1962, defendant BOB MADSEN did travel in interstate commerce from Idaho to San Diego, California, with the intent to

promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, the unlawful activity being a business enterprise involving a controlled substance; in violation of Title 21, United States Code, Sections 952, 960, 963, 841(a)(1) and 846, and the defendant did thereafter perform and attempt to perform acts to promote, manage and carry on and facilitate the promotion, management and carrying on of the unlawful activity previously described; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT SEVENTEEN

Beginning at a date unknown to the grand jury and continuing up to and including February 19, 1982, in the Southern District of California and elsewhere, defendant MARCEL RAYMOND OBERLIN unlawfully, knowingly and intentionally violated Title 21, United States Code, Sections 952, 960, 963, 841(a)(1), 846 and 843(b), as alleged in Counts One, Two, Three, Four, Five, Six, Seven, and Eight of this indictment (said counts being incorporated herein by reference) which violations were part of a continuing series of violations of the Controlled Substance Act, Title 21, United States Code, Sections 801, *et seq.*, and undertaken by defendant MARCEL RAYMOND OBERLIN, with at least five other persons with respect to whom defendant MARCEL RAYMOND OBERLIN, occupied a position of organizer, supervisor, and other positions of management from which such continuing series of violations defendant MARCEL RAYMOND OBERLIN obtained substantial income and resources, in violation of Title 21, United

States Code, Section 848, and that the profits obtained by him in such enterprise and the interests in, claims against, or other property or contractual rights of any kind affording a source of influence over such enterprise, are subject to forfeiture under the provisions of Title 21, United States Code, Section 848(a)(2), and are listed as follows:

1. $100,000.00 cash, which was in the possession of JOANN T. OBERLIN in Rio de Janeiro, Brazil, on February 19, 1982.

2. Stock Certificates Nos. 5 and 6, each representing 5,000 shares of Blue Creek Land and Cattle Company, Inc., seized by special agents of the Drug Enforcement Administration on or about February 23, 1982.

3. Real property described as Tracts 2, 3, and 4, Certificate of Survey 1843, The Juniper Subdivision, (W 1/2, W 1/2, Sec. 31, R1S, R26E, PMM) County of Yellow-Stone; State of Montana, owned by Blue Creek Land and Cattle Company.

4. Residence and real property described as 180 Rancho Bonita Way, Sonoma, California 95476, further described by the Sonoma County Tax Assessor as Parcel No. 056-120-30, owned by Marcel and JoAnn Oberlin.

5. $3,000.00 cash seized from Safe Deposit Box No. 06948, Bank of America, Sonoma Branch, Sonoma, California.

6. $755.00 cash seized from a wallet in the briefcase of MARCEL RAYMOND OBERLIN by special agents of the Drug Enforcement Administration on February 20, 1982.

7. 1979 Mercedes-Benz, Wyoming License No. 19-244AA, VIN #11603312092738, registered to Universal Leasing Company, P.O. Box 23, Evanston, Wyoming 82930.

8. 1979 Ford Harvest Motorhome, Wyoming License No. 19-245AA, VIN #E37AHEG3262, registered to Universal Leasing Company, P.O. Box 23, Evanston, Wyoming 82930.

9. 1979 MG Roadster, California License #AALM194, VIN #GHN5UL499427G, registered to Marcel R. Oberlin, P.O. Box 1295, Salt Lake City, Utah 84110.

10. Real property - Lot 9, Block 2, 21B McFarland Division, Yellowstone County, Montana, owned by Marcel and JoAnn Oberlin.

11. Real property - Lot 10, Block 1, 21B, McFarland Division, Yellowstone County, Montana, owned by Marcel and JoAnn Oberlin.

12. Real property - Lot 12, Block 1, 21B McFarland Division, Yellowstone County, Montana, owned by Marcel and JoAnn Oberlin.

13. Two rolls of quarters and a change bag, totaling $59.01, seized from the briefcase of MARCEL RAYMOND OBERLIN by special agents of the Drug Enforcement Administration on February 20, 1982.

14. VARIG Airlines passenger ticket No. 042 4222 645 647 4, in the name of Mr. M. Thie, for Flight #832, from Sao Paulo, Brazil, to Los Angeles, California, to Sao Paulo, Brazil, seized from MARCEL RAYMOND OBERLIN's briefcase by special agents of the Drug Enforcement Administration on or about February 20, 1982.

15. VARIG Airlines passenger ticket No. 042 4424 499 082 in the name of T. Thie, for a flight from Miami, Florida, to St. Martin, to Caracas, to Rio de Janeiro, Brazil, to Belem, seized from MARCEL RAYMOND OBERLIN's briefcase. by special agents of the Drug Enforcement Administration on or about February 20, 1982.

16. VARIG Airlines passenger ticket No. 042 4424 499 083 1 in the name of T. Thie for a flight from Belem to Miami, Florida, seized from the briefcase of MARCEL RAYMOND OBERLIN by special agents of the Drug

Enforcement Administration on or about February 20, 1982.

DATED: April 27, 1982.

A TRUE BILL

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Foreman

_____

PETER K. NUNEZ
United States Attorney

APPENDIX M

8 U.S.C. § 1101(a)(15)(S):

(a) As used in this chapter–

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens–

(S) subject to section 1184(k) of this title, an alien--

(i) who the Attorney General determines--

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

(ii) who the Secretary of State and the Attorney General jointly determine--

(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

(III) will be or has been placed in danger as a result of providing such information; and

(IV) is eligible to receive a reward under section 2708(a) of Title 22,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

8 U.S.C. § 1101(a)(43)(B)

(a) As used in this chapter–

(43) The term "aggravated felony" means--

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

8 U.S.C. § 1101(a)(43)(S)

(a) As used in this chapter–

(43) The term "aggravated felony" means--

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

8 U.S.C. § 1227(a)(2)(A)(iii)

(a) Classes of deportable aliens

(2) Criminal offenses

(A) General crimes

(iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1252(a)(5)

(a) Applicable provisions

(5) Exclusive means of review. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(b)(5)

(b) Requirements for review of orders of removal

(5) Treatment of nationality claims.

(A) Court determination if no issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court

of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination. The petitioner may have such nationality claim decided only as provided in this paragraph.

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1952(a)(3)(A)

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform–

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

21 U.S.C. § 841(a)(1)

(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

21 U.S.C. § 846

Attempt and conspiracy. Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 2347(b)(3)

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall--

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.